



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: December 12, 2007

CBCA 870

CAL, INC.,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

David Esparza, President of CAL, INC., Vacaville, CA, appearing for Appellant.

Carl B. Jorgensen and William Robinson, Office of General Counsel, Federal Bureau of Prisons, Department of Justice, Washington, DC, counsel for Respondent.

HYATT, Board Judge.

This appeal is from a contracting officer's decision taking deductions from amounts due to appellant, CAL, INC., under a contract to perform sanitary sewer and storm drain upgrades. Appellant has elected to proceed under the Board's interim expedited procedure for small claims, which is available at the election of a small business concern seeking to recover a disputed monetary amount of \$150,000 or less. Rule 52. 72 Fed. Reg. 36808 (July 5, 2007). This rule permits issuance of a decision in summary form. Decisions issued under the small claims procedure are final and conclusive and shall not be set aside except in cases of fraud affecting the Board's proceedings. 41 U.S.C. § 608 (2000); *Palmer v. Barram*, 184 F.3d 1373 (Fed. Cir. 1999). This decision has no value as precedent.

Findings of Fact¹

Background

1. On August 10, 2004, the Federal Bureau of Prisons (FBOP) awarded to CAL, INC. a contract to perform a sanitary sewer and storm drain upgrade for the Federal Correctional Institution (FCI) located at Terminal Island in San Pedro, California. Appeal File, Exhibit 1.

2. The contract's statement of work identified nineteen items that the contractor was expected to complete in performing the contract. The principal work was to "furnish and install storm drain and sewer pipe as shown on the plans. This included all saw-cut, asphalt and concrete demolition, excavation, de-watering, shoring, trenching, concrete encasement of pipe, backfilling and asphalt concrete restoration." Appeal File, Exhibit 1.

3. CAL, INC. performed the contract work principally through subcontractors, of which the most significant were Miramar Construction and EDA Design Professionals. Appellant's Discovery Requests (Oct. 1, 2007).

3. Following the award of the contract, numerous modifications, adding to the work and increasing the contract price, were issued. Appeal File, Exhibit 2.

4. In early 2007, with contract work not yet completed, FBOP entered into negotiations with CAL, INC. to bring the contract to a close, by deleting work that had not been started by appellant. FBOP sought to negotiate a global settlement of the contract with CAL, INC., including a full release of claims, to be effected through a bilateral modification to the contract canceling remaining contract work with the exception of certain enumerated tasks. Face-to-face negotiations took place on April 7, 2007, but were not immediately

¹ In keeping with the intent of the small claims procedure to resolve disputes as expeditiously and inexpensively as possible, the record in this matter has been developed primarily through written submissions of the parties, including the Rule 4 file, appellant's supplemental Rule 4 file, initial position papers submitted by the parties on October 26, 2007, and follow-up position papers submitted by respondent on November 30, 2007 and by appellant on December 5, 2007. These submissions include affidavits of employees who were closely involved with the project. In addition, the Board conducted several teleconferences with the parties and witnesses in efforts to clarify their contentions and to focus the issues raised in this dispute.

successful. Subsequently, CAL, INC.'s president and the contracting officer endeavored to reach an agreement. Respondent's Position Paper, Oct. 26, 2007, Exhibit 1, Declaration of Raymond Kelemenky, Contracting Officer (Oct. 24, 2007), ¶¶ 3-4 (First Kelemenky Declaration).

5. Modification 12 to the contract was issued on May 16, 2007. Under this modification, CAL, INC. agreed to accomplish various tasks to close out its obligations under the contract and to accept the sum of \$647,656.72 in full payment of its performance under the contract. FBOP agreed to release the amount of \$500,000 immediately. The remaining \$147,656.72 would be paid within ten days after CAL, INC. completed performance of the remaining terms and conditions of modification 12. Appeal File, Exhibit 3.

6. The tasks enumerated in modification 12 consisted of clean up of the site; removal of temporary fencing; removal of all material and equipment, and all stockpiled soil/debris piles; re-seeding, re-grading, and repair of the irrigation system; and restoration of the site and lay down area to its original condition and to the satisfaction of the FBOP. CAL, INC. was also required to furnish as-built drawings in AutoCAD showing all work performed at the site, including all utilities encountered, and to furnish a video/camera survey, or closed circuit television (CCTV) videotapes, of all lines installed. Appeal File, Exhibit 3. These tasks were continuations of contractual obligations included in the contract, and were considered by FBOP to be the minimum work needed to be accomplished for appellant to leave the work site. First Kelemenky Declaration, ¶ 6.

7. The performance requirements specified in modification 12 were to be completed by CAL, INC. between May 14 and June 12, 2007. Appeal File, Exhibit 3. The June 12 deadline was subsequently extended to July 2, 2007. Appeal File, Exhibit 16.

8. On July 9, 2007, CAL, INC.'s president e-mailed the contracting officer requesting final payment under modification 12. In a letter dated July 13, 2007, the contracting officer told CAL, INC.'s president to submit an invoice, but cautioned that the Government considered that there were numerous deficiencies in appellant's performance. Among other things, the contracting officer asserted that the as-built drawings could not be used due to the absence of critical information which would cause FBOP to incur costs to bring them up to a suitable industry standard; that CAL, INC. had not furnished the requisite video/camera survey of the sewage lines installed; and that FBOP was entitled to credits for hydro-seed, pine tree removal, and repair of a damaged concrete pad and water valve in appellant's work area. Appeal File, Exhibit 26.

9. Subsequently, CAL, INC. expressed disagreement with FBOP's proposed deductions and requested clarification of FBOP's position. In a letter dated July 30, 2007, the contracting officer sent CAL, INC. a proposed bi-lateral modification which included the deductions he had discussed in his letter dated July 13. Appeal File, Exhibits 29, 34. Appellant, on August 3, 2007, submitted a formal, certified request for a final decision on its entitlement to the remaining monies agreed upon in Modification 12. *Id.*, Exhibit 36. On August 7, 2007, the contracting officer acknowledged receipt of appellant's request for a final decision and issued a decision assessing an administrative deduction in the amount of \$67,301 and enclosing a unilateral modification to the contract. *Id.*, Exhibit 38.

10. Also in early August, CAL, INC. sent a package of videotapes to FBOP, apparently as its submission of the closed circuit television (CCTV) or camera survey videotapes of the installed lines. The contracting officer returned the package unopened, pointing out to appellant that the time for contract performance was past and that FBOP had already started to procure other services for this line item that had not been provided by the agreed upon date. Appeal File, Exhibit 40.

11. CAL, INC. appealed the contracting officer's decision and elected to proceed under the small claims option.

12. Following the filing of the appeal, it was agreed that CAL, INC. would resubmit the videotapes as part of its supplemental appeal file. Conference Memorandum, Sept. 25, 2007.

13. At issue in this appeal are the deductions made by FBOP for three items for which FBOP deducted amounts from CAL, INC.'s final payment. The Government retained the amount of \$51,230 to bring the as-built drawings up to par; the amount of \$10,713 to contract for CCTV videotapes of the work performed; and the amount of \$3008 to repair the cracked concrete slab and water valve. First Kelemencky Declaration, ¶¶ 9-12.

As-Built Drawings

14. Under Modification 12, appellant agreed to provide the FBOP with AutoCAD drawings showing all work installed under the project and all utilities encountered during performance ("as-built" drawings). This was a continuation of the contract requirement to provide as-built drawings. Finding 6.

15. The relevant contract provision, as set forth in the statement of work, states the following:

A complete set of engineered drawings shall be provided to the Owner. As-builts shall be submitted at the completion of the project before final payment. An Electronic copy of all drawings shall be in the AutoDesk, AutoCAD version 2004 format and forwarded to the Engineering Department at FCI Terminal Island. The drawings will remain at the institution for maintenance reference.

Appeal File, Exhibit 1. The requirement to provide as-built drawings was expressly reincorporated in Modification 12. *Id.*, Exhibit 3.

16. The FBOP project representative and contracting officer's technical representative (COTR), who oversaw appellant's contract performance for the entire period of contract performance, reviewed the as-built drawings after they were received by respondent. He concluded that the CAL, INC. drawings were massively inadequate in that nearly all of the drawings lacked critical information concerning the lines installed and utilities encountered. He informed the contracting officer that CAL, INC.'s drawings were so deficient as to fail to conform to industry standards and advised that potholing to retrieve the missing information would be necessary, and would take a minimum of three weeks to gather sufficient information to complete the drawings.² Respondent's First Position Paper, Oct. 26, 2007, Exhibit 3; Respondent's Second Position Paper, Declaration of John Raposa, Nov. 30, 2007 (Second Raposa Declaration), Exhibit 1.

17. In a telephone conference held on November 15, 2007, FBOP arranged for the COTR, Mr. Raposa, to participate, and CAL, INC. arranged for one of its project managers, Mr. LaPointe, to be available as well. After Mr. Raposa discussed a few specific as-built drawings, identifying what information was missing, and advising that nearly every drawing was deficient in terms of providing critical information about work performed and utilities encountered, Mr. LaPointe recognized that the information identified by Mr. Raposa indeed was not provided on the as-built drawings but should have been. Mr. LaPointe urged, however, that the Government's proposed remedy is excessively expensive. According to Mr. LaPointe, FBOP could use less invasive techniques, such as lifting manholes, dropping

² "Potholing" is an industry term that refers to excavation of test holes in order to locate utility lines buried in the area in which work will be performed. *See R. P. Richards Construction Co. v. United States*, 51 Fed. Cl. 116, 120-21 (2001).

line locators, and using CCTV videotapes to derive the needed information for the as-builts. Conference Memorandum, Nov. 16, 2007.

18. Following the November 15, 2007 teleconference, the Government arranged for Mr. Raposa to prepare a memorandum detailing the Government's concerns with the omissions and inaccuracies in the as-built drawings submitted by CAL, INC. Mr. Raposa states in his memorandum that it is critical to have accurate and complete as-built drawings to support future construction in this area. He then provides numerous examples of where and why potholing is necessary at a variety of locations in order to ascertain location, depth, size and material of storm drain lines, sewer laterals, roof drains, and other installations that are not noted on the drawings. He maintains that some potholing, along with the techniques advocated by appellant, is necessary to ensure the requisite degree of completeness and accuracy to avoid future costs to the Government when work is done in these areas. Respondent's Second Position Paper, Exhibit 2.

19. In a paragraph-by-paragraph response to the COTR's memorandum, CAL, INC. generally argues that while the information as to location, depth, size and material is missing, this information can usually be derived in a variety of ways that are less expensive and invasive than potholing. For example, some of this information is available through visual inspection or by reference to contract requirements that require use of specific materials at specified locations, often where existing utility lines were replaced. In most cases, appellant contends, pipe was installed as shown on the plans and the as-builts can be rectified by transferring that information onto the new drawings. In other cases, FBOP could refer to its own drawings or use a tracer wire at the drop inlet location. For some areas, the necessary information could be derived by lifting a manhole cover. In still other instances, using such techniques as CCTV and tracer wire at manhole locations, and then performing simple mathematical calculations would, according to CAL, INC., enable the Government to derive depth and slope installation for the pipes at issue. Finally, appellant notes, the COTR took extensive photographs of work in progress during the life of this construction project which would also provide information as to the as-built condition of the area. Appellant's Second Position Paper, Dec. 5, 2007.

20. FBOP's Regional Facility Manager, in an internal electronic mail message addressing the administrative deductions proposed by the contracting officer, observed in passing that "I think the camera is close and I think if done correctly it can save us a lot of potholing and site observation." He did not, however, dispute the amount proposed by the contracting officer for bringing the as-built drawings up to par. Appeal File, Exhibit 35.

21. Mr. Raposa attested that the cost to pothole has been determined to be approximately \$38,190. In addition, it will cost another \$13,040 to have an

architect/engineer perform site surveys, other research, and then place as-built conditions on the supplied CAD drawings³, for a total cost of \$51,230. After learning of CAL, INC.'s contention that the drawings can be fixed less expensively, Mr. Raposa obtained an estimate for performing the work in the manner suggested by appellant. This estimate came to \$33,750. In Mr. Raposa's opinion, the CCTV and line locating approach is nearly as expensive, and less accurate, than potholing. Appeal File, Exhibit 31; Second Raposa Declaration at 2-3.

22. CAL, INC. itself performed extensive potholing prior to installing the sewer lines at the prison. The COTR tried to determine a minimum amount of time needed to retrieve the missing critical information and used prices charged by CAL, INC to pothole. CAL, INC. was paid \$57,330 to perform pre-construction potholing. Second Raposa Declaration at 2-3; Declaration of Raymond Kelemencky (Nov. 29, 2007) at ¶¶ 3-4 (Second Kelemencky Declaration).

Video/Camera Survey of Installed Lines

23. FBOP did not receive a timely transmission of the video/camera survey tapes required by Modification 12. First, the tapes were submitted late, after the contracting officer issued his decision. Second, after reviewing the tapes, which were resubmitted by CAL, INC. following the filing of this appeal, the project representative reviewed the tapes and determined that the video tapes were old tapes that showed pre-construction lines, rather than post-construction work. The videos that were submitted by CAL, INC. showed only a small percentage of the sewer line installed by appellant, and there were no videotapes of the storm drain lines showing post-construction work. Second Raposa Declaration at 3.

24. FBOP has estimated the cost of having CCTV videotapes taken of the installed lines to be \$10,713. Appeal File, Exhibit 38. This amount is what FBOP paid appellant to perform a pre-construction CCTV survey. Second Kelemencky Declaration at ¶ 4.

Damages to the Water Access Concrete Slab and Water Valve Access Covers

25. Under the statement of work in the contract, appellant was required to restore the job site "to original conditions for all areas of disruption (i.e., turf, foliage, asphalt, concrete, brick, etc.)" and to locate, protect, and repair at its expense, any utilities damaged by its forces. Appeal File, Exhibit 1. Modification 12 reinforced this requirement, with the

³ Of the architect's fee, the amount of \$1560 is for the purpose of placing as-built conditions on supplied CAD drawings. Appeal File, Exhibit 31.

proviso that appellant “restore the site and lay down area to it’s [sic] original condition and to the satisfaction of the FBOP.” *Id.*, Exhibit 3.

26. FBOP’s project representative stated that the project lay-down area included a concrete slab and its water valve access covers. The access points permit FBOP to open or close the underground water valves located underneath the slab. The slab and access points are located approximately thirty feet from the roadway, in a grass-covered park area. Prior to appellant’s use of the area as a lay-down area, the concrete slab and the covers were in excellent condition. Respondent’s First Position Paper, Exhibit 2, Declaration of John Raposa (Oct. 23, 2007) (First Raposa Declaration).

27. During the course of the project, this area served as the main entrance to the lay-down area. Deliveries from heavy trucks carrying building materials would pass over the affected area. In addition to the operating heavy equipment over this area, CAL, INC. placed waste containers, debris, and other materials on top of the valve access area throughout the course of the project. First Raposa Declaration.

28. CAL, INC. was the only contractor in this area operating heavy equipment large enough to damage the slab and valve covers. Second Raposa Declaration at 1-2.

29. FBOP noticed the damage to the slab and valve covers after CAL, INC. restored the work area and turned the site over to FBOP. Appeal File, Exhibit 34. The cost to repair this damage is estimated to be \$3008. *Id.*, Exhibit 31.

Discussion

CAL, INC.’s appeal challenges as unjustified FBOP’s deductions from its final payment for as-built drawings, CCTV videotapes, and repairs to the concrete slab and valve access covers. Initially, appellant maintained that the as-built drawings submitted were in fact compliant with the specifications and industry standards. In a teleconference held on November 16, 2007, after Mr. Raposa provided detailed input on respondent’s concerns with omissions and inaccuracies in the as-built drawings submitted by CAL, INC., appellant conceded that the as-built drawings were not accurate and complete as submitted to FBOP. Appellant now contends instead that the amount FBOP proposes to deduct is excessive. In addition, appellant maintains that it did not notice and FBOP did not inform it of damage to the water valve/concrete slab in its work area at the time it completed its efforts under Modification 12.

As-Built Drawings

In the position paper submitted on November 30, 2007, the Government included a detailed statement, authored by the COTR, identifying in detail the omissions and defects in the as-built drawings that were provided by the contractor. Finding 18. In analyzing Mr. Raposa's memorandum, appellant did not claim that the information identified as missing was provided on the drawings, but focused on its preferred, less costly, approach to obtaining the information and correcting the drawings. Finding 19.

It is clear that the as-built drawings submitted by CAL, INC. did not conform to any reasonable interpretation of its obligation to supply as-built drawings that showed all work performed under the contract and outlined any and all utilities encountered. Thus, the Government is entitled to make a downward adjustment to the contract price to defray the cost it will incur to correct these deficiencies. In support of this proposition, FBOP cites *Toombs & Co. v. United States*, 4 Cl. Ct. 535 (1984), *aff'd*, 770 F.2d 183 (Fed. Cir. 1985) (table). In *Toombs*, which involves similar facts, the Government rejected the contractor's submission of a "full set" of as-built drawings on the ground that the drawings failed to reflect various modifications and field changes to the work. The Government's deduction of the cost of revising the as-built drawings was upheld by the court.

The primary focus of the parties in their supplemental submissions is on what constitutes a reasonable cost to bring the as-built drawings into compliance with contract requirements. FBOP, relying on the COTR's experience and expertise⁴, asserts that the most accurate method of bringing the as-builts up to acceptable industry standards is to pothole at various locations on site to determine conclusively the locations, depths, and slopes of installed sewer lines and drains. Finding 18. CAL, INC. argues strenuously that the Government's position is unreasonable because a variety of other, less expensive means exist to derive the information that is missing from the as-built drawings. Finding 19.

The Government maintains that the amount of its proposed deduction is reasonable, pointing out that CAL, INC. itself performed extensive potholing prior to installing the sewer lines at the prison. The COTR priced this effort using what he deemed to be the minimum amount of time likely to be needed to retrieve the missing critical information. He used prices charged by CAL, INC. to pothole. CAL, INC. was paid \$57,330 to perform pre-construction potholing, which FBOP believes corroborates the reasonableness of its proposed amount of \$38,190 to perform potholing at critical points to ensure the as-built drawings are complete and accurate. Finding 21.

⁴ Second Raposa Declaration at 2-3.

CAL, INC., in addition to maintaining that potholing is not justified to derive accurate as-built drawings, questions the reasonableness of the Government's estimate that the cost of achieving acceptable as-builts through the use of CCTV and line tracers would not be much less than that for potholing. Appellant's Second Position Paper. It also points out that the Government's position appears to assess a double charge for CCTV videotaping, since FBOP has already deducted \$10,713 for this item. Appellant suggests that it should suffice to obtain the CCTV videotapes and pay the architect/engineer \$1560 to transfer as-built information onto the CAD drawings. Apparently, appellant attributes no cost to the time and effort required to lift manholes, review photographs, make visual observations of the site, take measurements, and perform calculations which it concedes would be necessary to derive the information to be entered on the drawings. Thus, we can gather that appellant's approach would be less expensive than potholing, but cannot effectively gauge how much less.

We are mindful that, in general, the Government has a duty to mitigate damages occasioned as a result of an appellant's breach of its contractual obligations. *See Churchill Chemical Corp. v. United States*, 602 F.2d 358, 361 (Ct. Cl. 1979). Whether the Government's approach here meets that duty is a question of fact resolved by inquiring into the reasonableness of FBOP's preferred method of correcting the as-built drawings. *See, e.g., Puroflow Corp.*, ASBCA 36058, 93-3 BCA ¶ 26,191; *Birken Manufacturing Co.*, ASBCA 32500, 90-2 BCA ¶ 22,245. In making this assessment, we recognize that it would not necessarily be appropriate to impose on the Government a cost limitation representing a less than optimal solution to appellant's breach of its obligation to provide appropriate as-built drawings at the conclusion of contract performance. The breaching party is generally not entitled to dictate the actions of the non-breaching party in rectifying the breach. *See Western Alaska Contractors, Inc.*, ASBCA 46033, 95-1 BCA ¶ 27,392 (1994). In weighing the competing contentions of the parties we note that the COTR, in a sworn declaration, has unequivocally stated that potholing is necessary to achieve the desired degree of accuracy in the as-built drawings. Although CAL, INC. disagrees, it has not actually stated or attested that its approach would achieve the same degree of accuracy as would the potholing proposed by the Government. We are not prepared in these circumstances, to second-guess the Government's position.⁵ We find that FBOP has met its burden to justify the reasonableness of its deduction with respect to appellant's failure to submit satisfactory as-built drawings.

⁵ Although one FBOP employee suggested in passing that use of CCTV tapes might reduce the need for potholing, finding 20, which provides some support for appellant's arguments, this does not outweigh the view of the COTR.

CCTV Survey

Appellant failed to submit the requisite tapes in a timely manner. The tapes that were eventually provided and reviewed by the COTR were noncompliant with the contract requirement. In its final submission, appellant does not appear to contest the amount deducted by FBOP to remedy this omission. Accordingly, we find that the Government properly deducted this amount from the final payment.

Damage to Concrete Slab and Access Valve Covers

FBOP argues that under the terms of the contract, appellant was responsible for restoring the work area to its “original condition.” FBOP’s project representative has testified that at the inception of contract work, the concrete pad and valve covers were in “excellent condition.” FBOP has also attested that no other contractors with the type of heavy equipment that would damage the slab and valve covers were working in the area during the duration of appellant’s performance of the contract.

Appellant concedes that the concrete pad and water valves were at the edge of its work area, but has no knowledge of the damage. Appellant’s main argument is that FBOP did not immediately inform its site supervisor of the damage, although it had been quick to point out other areas that were damaged and to demand repairs. FBOP points out that it did not have an opportunity to observe the area until appellant’s subcontractor demobilized and it promptly raised the issue at that time.

FBOP submitted the COTR’s sworn statement that the damage to this area was caused by appellant, through its subcontractor, which was the only party in the area that operated the type of heavy equipment that would damage the slab and valve covers. The COTR also attested that on many occasions he observed the contractor operating heavy equipment in this area. Given this testimony, and the absence of any other likely source of the damage, it is highly probable that the damage is attributable to CAL, INC.’s actions. The contract clauses place the burden on appellant to restore damaged structures to their original condition. *Environmental Data Consultants, Inc. v. General Services Administration*, GSBCA 12591, et al., 97-2 BCA ¶ 29,208, at 145,373. The Government has submitted credible evidence of the cost to fix the valve covers. Accordingly, we agree that CAL, INC. was responsible for these damages and FBOP properly withheld the amount of \$3008, the cost of repairs, from appellant’s final payment.

Decision

The appeal is **DENIED**.

CATHERINE B. HYATT
Board Judge