UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: June 28, 2022

CBCA 6892

AHTNA CONSTRUCTION & PRIMARY PRODUCTS COMPANY, LLC,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Adam W. Cook and Shane C. Coffey of Birch Horton Bittner & Cherot, Anchorage, AK, counsel for Appellant.

Randall Lockyear, Jennifer McVey Thomas, and Boykin D. Lucas, Office of the General Counsel, Department of Agriculture, Juneau, AK, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **SHERIDAN**, and **CHADWICK**.

SHERIDAN, Board Judge.

Ahtna Construction & Primary Products Company, LLC (ACPPC) appealed a decision of the United States Department of Agriculture (the Government or Agriculture) on a certified claim for cost overruns on a remediation project. In January 2021, the Board partially denied relief because the contract said nothing about soil conditions, and ACPPC did not "allege an affirmative representation or indication in contract documents about the frozen soil at issue in this case." *Ahtna Construction & Primary Products Co. v. Department of Agriculture*, CBCA 6892, 21-1 BCA ¶ 37,777, at 183,359. From April 12 to 16, 2021, we held a hearing concerning defective specifications, acceleration, delay, and damages. ACPPC failed to present cohesive, compelling evidence of liability and causation resulting in injury. We deny relief for defective specifications because ACPPC is an experienced

Alaska contractor that bid on a fixed-price contract in interior Alaska that did not state the condition of the soil to be expected, and ACPPC should have known it might have to work with frozen material. Other arguments similarly fail for lack of evidence. Because the Government acknowledges it owes ACPPC a final payment of $449,517.80, we award ACPPC that amount.

Background

We previously summarized many of the relevant facts. *See Ahtna Construction*, 21-1 BCA at 183,356–58. We repeat facts below as necessary to explain the basis for our decision.

Agriculture awarded the contract to ACPPC in February 2018. In general, the work involved regrading a basin in the Delta–Clearwater Remediation Project in Delta Junction, Alaska, with fill and then installing non-frozen woody debris, hydro-seeding, rip-rap, and plants to stabilize the project. The price was fixed at $7,868,014.95, some of which consisted of fixed unit prices for estimated quantities. Agriculture issued an "optional" notice to proceed, authorizing mobilization, in March 2018 and the formal notice to proceed on June 4, 2018. ACPPC mobilized on June 11. The contract required completion within 150 days of the formal notice to proceed, i.e., by November 1, 2018.

ACPPC's superintendent testified that during a site visit in May 2018 and after starting work, ACPPC found "hard ice," frozen soil, and deep frost in the on-site spoil piles from which ACPPC was to obtain the fill. ACPPC promptly requested a contract modification to expand the length of the project in which ACPPC could work at any given time from 1000 feet to 1500 feet or more, saying that the extra space would allow ACPPC to spread more fill to thaw and dry. Agriculture had concerns about potential environmental degradation and flooding. The parties discussed modification language that included a waiver imposing risks on ACPPC but did not come to an agreement on a modification. ACPPC blames many of the delays it experienced on its inability to work outside the authorized zone. Government witnesses opined that ACPPC had enough room near the spoil piles to thaw fill but that ACPPC chose not to use that space because doing so would have required equipment that ACPPC did not have on site.

ACPPC fell behind its approved schedule. On July 26, 2018, the contracting officer issued a cure notice instructing ACPPC to begin working twelve hours per day, seven days a week and to submit a plan for additional resources, labor, and equipment that ACPPC would use to get back on schedule. Witnesses for ACPPC testified that they thought the cure notice was unjustified and the acceleration would have been unsafe. The parties do not cite a written response by ACPPC to the cure notice, although there was testimony that ACPPC increased its work hours and crew size in August 2018.

On October 7, 2018, the parties agreed that ACPPC could stop work for 2018. ACPPC remobilized in June 2019 and completed the work on September 14, 2019, having worked a total of 117 days, whereas its planned schedule had shown it planned to complete the work in only fifty-five days. Among the reasons ACPPC had to work in 2019 were that ACPPC and its subcontractors initially performed fertilizer application, live staking, and other landscaping work incorrectly and had to correct the work in 2019.

ACPPC submitted a certified claim for $3,190,599.41 in February 2020. ACPPC alleged it encountered a differing site condition of unusable "frost-laden and saturated fill between two to four feet down in every spoil pile" as well as weather delays, which forced performance into a second year. The claim included costs of $2,432,630.90 for materials and $757,966.51[1] for seventy-seven days of "excusable and compensable delay." The contracting officer denied all but $28,003.50 of the claim (for an increased quantity of rip-rap) in July 2020. ACPPC timely appealed in August 2020.

As discussed in our 2021 decision, ACPPC's September 2020 complaint alleged differing site conditions, defective specifications, acceleration, and delay. We granted leave to amend the complaint to delete one count and dismissed the differing site conditions count for failure to state a claim. *Ahtna Construction*, 21-1 BCA at 183,356–57.

In the hearing, ACPPC sought costs in two categories: (1) $509,226.54 for providing extra materials beyond the amounts set forth in the contract, and (2) $2,793,364.13 in delay and acceleration costs caused by defective specifications. Agriculture stated in a prehearing filing and through a witness that it owes ACPPC $449,517.80 as a final contract payment based on quantities delivered to the site for which Agriculture says ACPPC did not properly invoice.

Both parties presented expert witnesses. As pertinent here, ACPPC's delay expert, Thomas Caruso, opined that the Government caused twenty-six days of delay in May 2018, before the full notice to proceed (when Mr. Caruso erroneously believed ACPPC was "on standby") and another twenty-eight days of delay by requiring ACPPC to handle frozen soil and vegetation. He also assigned Agriculture responsibility for twelve days of delay due to "excessive shrinkage" of fill and thirty-seven days for holidays, weather, equipment breakdowns, and other issues, most of which would at best be excusable but not compensable under the contract. Mr. Caruso's report and testimony were largely conclusory and based on contradictory assumptions that we find unhelpful and unconvincing. Mr. Caruso asserted implausibly that there was no period in 2018 when ACPPC was not impacted by adverse conditions. He also testified that he relied on information ACPPC provided him, which

[1] Costs add up to $3,190,597.41, not $3,190,599.41.

rendered his conclusions one-sided. *Cf. CTA I, LLC v. Department of Veterans Affairs*, CBCA 5826, et al., 22-1 BCA ¶ 38,083, at 184,939. Mr. Caruso did not present an accurate picture of the delays. It is clear that ACPPC was mostly responsible for them.

On the "shrinkage" issue, ACPPC's expert testimony undercut its lay testimony. An ACPPC employee testified that he estimated, based on comparing the volumes of compacted material with the total incoming truck loads, that the fill material compacted by about 40% when dried and thawed. By contrast, an ACPPC consultant, Keith Mobley, concluded, among other things, that some shrinkage would be expected on this project, 40% seemed unlikely, and truck count was not a valid way to measure volume. An Agriculture expert, Ben Deorge, explained persuasively that the only meaningful way to measure compaction would have been to compare the volume of the spoil piles to the volume of compacted soil placed in the project, which ACPPC did not do.

Discussion

Throughout the litigation, the Board found it difficult to pin down ACPPC's claims for relief. ACPPC argues in its post-hearing brief:

> (1) the 1000-foot work zone limitation was a defective specification that prevented ACPPC from laying out frozen excavated materials onto the basin to thaw, use, and dry, forcing ACPPC to use scalping and double-handling methods that destroyed mandatory performance time;
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> (2) ACPPC experienced a total of seventy-eight days of compensable delay due to the late notice to proceed or design errors and forty-two days of excusable but not compensable delay due to adverse weather or other factors;
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> (3) ACPPC experienced constructive and directed acceleration, causing it to pay recoverable overtime;
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> (4) ACPPC experienced cost overruns for delivered material such as sand, gravel, and woody debris for which it invoiced the Government, and of the invoiced amounts, $509,226.54 remains unpaid; and
>
> (5) ACPPC is entitled to $2,793,364.13 for costs incurred due to defective specifications and directed acceleration, which includes costs for additional overtime labor for the on-site earthfill ($989,135), unplanned remobilization costs ($629,174), and costs for an unplanned second season ($1,238,433).

As we understand it, ACPPC seeks a final payment of $509,226.54, which includes $449,519.80 of costs that the Government does not dispute, for delivered items such as sand, gravel, and woody debris, and $59,708.74 for extra rip-rap, which the Government does dispute. ACPPC seeks another $2,793,369.13 that it says it incurred due to "defective specifications and directed acceleration," "entirely attributable to the defects in [the project] design" and Agriculture's "refusal to correct that defect with a simple change in the work zone limitation."

The record establishes that no contract specifications were defective, and the contract work did not constructively change. The fact that ACPPC encountered frozen soil in Alaska and had a contractually limited work area did not make the specifications defective, merely challenging. ACPPC failed to mobilize sufficient equipment and personnel to meet its schedule. The Government is not liable for ACPPC's cost overruns.

The contract was fixed-price, with eighteen items priced in units and eight items as lump sums.[2] Accordingly, ACPPC "'assume[d] the risk of unexpected costs not attributable to the Government.'" *Matrix Business Solutions, Inc. v. Department of Homeland Security*, CBCA 3438, 15-1 BCA ¶ 35,844, at 175,283 (2014) (quoting *IAP World Services, Inc. v. Department of the Treasury*, CBCA 2633, 12-2 BCA ¶ 35,119, at 172,445); *see also Pernix Serka Joint Venture v. Department of State*, CBCA 5683, 20-1 BCA ¶ 37,589, at 182,522–23. Unexpected problems do not automatically warrant compensation. *See United States v. Spearin*, 248 U.S. 132, 136 (1918) ("Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered."); *McNamara Construction of Manitoba, Ltd. v. United States*, 509 F.2d 1166, 1169–70 (Ct. Cl. 1975).

ACPPC simply did not plan any thawing or drying operations. Two ACPPC witnesses characterized the language in the specifications prohibiting the use of frozen soil as fill as "boilerplate" and made clear ACPPC had no plans to meet that requirement. Essentially all of ACPPC's difficulties stemmed from the fact that it unreasonably planned for optimal conditions. ACPPC's own consultants opined that it should have expected, and planned to handle, semi-frozen and frozen materials. A reasonably prudent contractor should have considered some methods of processing such materials within the contractually allowed work zone. ACPPC was unable to deal with frozen materials effectively.

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[2] ACPPC raises arguments suggesting that because the contract included unit prices, it was not fixed-price. To the contrary, contracts with fixed unit prices are fixed-price contracts. *See Lakeshore Engineering Services, Inc. v. United States*, 748 F.3d 1341, 1347 (Fed. Cir. 2014).

ACPPC shows no defect in the specifications.[3] We see no evidence that a contractor could not have completed the work on time using different means and methods within the 1000-foot work zone. ACPPC chose its method of laying out the fill materials with full knowledge that it was limited to 1000 feet at a time. It chose to mobilize later than it could have and to schedule fewer than the maximum possible hours with full knowledge that it had a 150-day performance period. The record also does not indicate "excessive shrinkage" of dried fill; in fact, witnesses for both sides testified that the 40% shrinkage factor alleged by ACPPC was not credible. The most probative testimony estimated the shrinkage at around 5%, which would not be unusual or unexpected.

Absent grounds to blame the Government's specified requirements or unforeseeable conditions for ACPPC's slow progress, ACPPC cannot recover for delay or acceleration. *See Fraser Construction Co. v. United States*, 384 F.3d 1354, 1361 (Fed. Cir. 2004); *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (en banc); *Amec Foster Wheeler Environment & Infrastructure, Inc. v. Department of the Interior*, CBCA 5168, et al., 19-1 BCA ¶ 37,474, at 182,036–39. The record shows that the project delays and cost overruns were ACPPC's fault and only worsened in 2019, when ACPPC did not complain about soil conditions. We find the opinions of ACPPC's delay expert unhelpful to ACPPC's case, as the expert did not clearly address the project's critical path or apportion blame for delays and forfeited credibility for other reasons discussed above.

Even if we were inclined to find government liability, ACPPC would fall short in proving quantum, other than as discussed below. ACPPC effectively seeks 100% of its cost overruns from its bid estimates except for $336,305.92, which ACPPC deducts as apparently representing mostly claim preparation and landscaping costs. This is, therefore, a modified total cost claim in which ACPPC takes virtually no responsibility for its own delays or inefficiencies, which, on this record, is unreasonable. *See., e.g.*, *Delco Electronics Corp. v. United States*, 17 Cl. Ct. 302, 319 (1989), *aff'd*, 909 F.2d 1495 (Fed. Cir. 1990) (table). As ACPPC is responsible for substantial added costs it makes no effort to quantify, we could not make an award based on modified total cost, and we find it inappropriate to fashion a

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[3] Although Agriculture does not raise the issue, we are not sure we have jurisdiction to address the allegation of defective specifications, as the operative facts may not have been presented to the contracting officer. *See Lee's Ford Dock, Inc. v. Secretary of the Army*, 865 F.3d 1361, 1369–70 (Fed. Cir. 2017). ACPPC "morphed" a portion of its dismissed differing site conditions count into a dispute about defective specifications without submitting a new certified claim. We need not resolve our jurisdictional concerns because we deny relief under this theory in any event. *See ServiTodo LLC v. Small Business Administration*, CBCA 6055, 18-1 BCA ¶ 37,170, at 180,938 n.5.

"jury verdict" as ACPPC requests in the alternative. *See Douglas P. Fleming, LLC v. Department of Veterans Affairs*, CBCA 3655, et al., 16-1 BCA ¶ 36,509, at 177,880.

We do award some money. The parties agree that ACPPC is owed a final payment but disagree on the amount. Agriculture admits that ACPPC is entitled to $449,517.80 for delivered materials. We accept that factual stipulation per Rule 9(a)(1)(v) (48 CFR 6101.9(a)(1)(v) (2020)) and consider whether ACPPC is entitled to the additional $59,708.74 it seeks (totaling $509,226.54). The disputed amount involves a disagreement about the volume of rip-rap that ACPPC installed (Agriculture says 927 cubic yards; ACPPC says 1586 cubic yards) and an allegation by ACPPC that Agriculture improperly disallowed the use of "salvaged" rip-rap. We do not see documents or other evidence in the record sufficient to award the additional $59,708.74.

We have considered ACPPC's other arguments and do not find them persuasive.

Decision

The appeal is **GRANTED IN PART**. Agriculture shall pay ACPPC $449,517.80 plus interest under 41 U.S.C. § 7109 (2018) from February 11, 2020, until the date of payment. The remainder of the appeal is denied.

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Kyle Chadwick
KYLE CHADWICK
Board Judge