



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: June 29, 2023

CBCA 7472

GC WORKS, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Diana Lyn Curtis McGraw and Nicholas T. Solosky of Fox Rothschild LLP, Washington, DC, counsel for Appellant.

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

VERGILIO, Board Judge.

GC Works, Inc. (contractor) disputes a decision by a contracting officer for the Department of Agriculture (agency) denying relief (both money and time) for an alleged changed condition arising under a contract between the parties. The contractor now contends that changed conditions resulted in eighteen days of compensable delay as it seeks \$15,191.26, also relying upon theories of breach.

The contractor has elected the small claims procedure, such that this decision by one judge is final, conclusive, and non-precedential, and may be set aside only in cases of fraud. 41 U.S.C. § 7106(b) (2018); 48 CFR 6101.52 (2022). The Board grants in part the claim, concluding that the changed conditions were more modest than the contractor claims, and that the contractor is responsible for a period of delay which makes most of the sought costs non-compensable. The contractor is to recover \$5000, plus interest.

Findings of Fact

Under pertinent aspects of the design-build contract, the contractor was responsible for providing and installing a new gate assembly (a sluice gate) for outlet control of a dam spillway. The contract contains Federal Acquisition Regulation (FAR) clauses concerning time extensions, changes, and disputes. 48 CFR 52.211-13, .243-4, .243-5, .333-1 (2021) (FAR 52.211-13 (SEP 2020), 52.243-4 (JUN 2007), 52.243-5 (APR 1984), 52.243-5 (JAN 2017), 52.333-1 (MAY 2014)). The agency provided a conceptual design for a new gate assembly and design documents of the existing gate assembly. The contractor was required to and did submit manufacturer's details of all new components for agency review and approval.

The existing gate was submerged. The new gate was designed with holes to match those in the agency-provided drawings of the existing gate assembly and frame, which depicted bolt locations and 5/8-inch threaded rods or bolts. In the contract, the contractor allocated time and attributed costs to cut the existing bolts in the concrete frame, drill out the bolts, grout and epoxy those holes and cracks, and install (drill and epoxy) new bolts in the frame for the gate. The contractor produced a new gate complying with the drawings.

Shortly before installation, water was drained sufficiently to permit removal of the old and installation of the new gate. On March 11, 2022, with the old gate and frame exposed, the contractor recognized, and shortly informed the agency, that the existing conditions did not match the drawings—the bolts (in the frame) and corresponding bolt holes (in the gate) were not at the locations depicted in the design documents for the existing gate assembly. Specifics (in terms of numbers and actual locations, except for one bolt) have not been provided. Further, 1/2-inch (not 5/8-inch) bolts were used in the existing structure.

The agency recognized a variation, as reflected in its March 11, 2022, issuance of a notice of noncompliance that specified that the new gate frame holes do not match up with the existing holes. Because the holes are placed in accordance with the agency-provided drawings, the locations of the bolts in the existing frame varied from those depicted. The Board finds that the actual conditions differed from the drawings.

On March 12, 2022, the contractor expressed its concerns to the agency regarding the notice of noncompliance; the contractor specified that no deviation from the plans had occurred. On March 13, the contractor referenced the changed condition, resulting from inaccurate as-built drawings, and considered the way forward as a minor field modification to accommodate existing conditions; new holes would be drilled. On March 15, the contractor proposed a solution that involved cutting the old bolts and field drilling and securing 1/2-inch bolts in the concrete frame to match the holes in the new gate. The agency expressed concern with the proposed bolt size, which varied from the 5/8-inch bolts noted

in the drawings and the approved submissions for the new gate. As relayed to the agency on March 17, and further confirmed thereafter, the contractor obtained engineer support for the use of 5/8-inch (and disapproval of its proposed 1/2-inch) bolts, with the need to ensure that the concrete and epoxy were sufficient to hold the bolts. In this period, the contractor provided the agency with assurances that the required anchor bolts came with the gate assembly—as they were always part of the assembly. The agency approved this solution on March 22, noting that the contractor would need to ensure the adequacy of concrete at the drilling sites. After rain and rising water levels, with work not possible for several days beginning March 23, the gate was installed on March 28–29, 2022.

In numerous claims or requests for relief, the contractor has put forward varying dates of actions, dollar figures, and accountings of time. These variations highlight a problem with the credibility of the contractor's information. As of May 17, 2022, the contractor sought six days of compensable delay and \$5518.43 in the initial claim to the contracting officer. As of May 24, 2022, the contractor claimed nine days of delay (although the contractor again states that three days were occupied with miscellaneous activities, and the same time period is identified as in the May 17 claim) and \$9743.02. As of January 23, 2023, the contractor sought eleven days of delay and \$23,108.85. In its most recent submission, the contractor identifies eighteen days of delay and seeks \$15,191.26.

At best, if the frame and gate had been as depicted in the agency's design documents, the contractor could have removed the existing and installed the new bolts on March 12 (a Saturday), allowed the epoxy to cure, and completed the installation on March 14. Had the contractor not proposed a change from the contract in bolt size, the agency could have recognized the changed conditions of the bolt locations by March 17, such that bolt installation could have occurred on March 18, and the gate would have been installed on March 19 or 21. This reflects a delay of five or seven days. However, the contractor indicated in the initial claim that it performed some contract work for three days during this period. The contractor, who bears the burden of proof, has not demonstrated that March 19 would not have been a work day. The record now supports the conclusion that the contractor incurred costs and mark-ups of \$5000, which would not have been incurred but for the changed conditions over five days, reduced by an amount for the period the contractor said it was able to continue with some performance. This amount reflects costs for labor, general requirements, equipment, and mark-ups but excludes other costs the contractor incurred because of its own proposed variation in the bolt size, a proposal rejected by the agency and not supported by the gate manufacturer.

Although the contractor proposes a finding of fact that it intended to utilize the existing anchor bolts attached to the concrete structure, its reference and the record do not support the assertion. Rather, the contractor was required to remove the existing anchor bolts and install new stainless steel bolts which came with the new gate. The contract contains

pricing reflective of such efforts. The contractor's asserted intent—seemingly unstated and inconsistent with the contract terms—does not provide a proper basis for relief.

Discussion

The contractor seeks relief based upon its assertions that it is entitled to payment (1) because of the changed condition; (2) the agency breached the contract by not compensating the contractor under the Changes clause; and (3) the agency breached the contract and violated the Prompt Payment Act when the agency failed to pay all amounts due and owing under the contract.

The latter two bases readily are denied. Under the Changes and the Changes and Changed Conditions clauses, the contractor may seek and obtain relief. The agency did not breach the contract when it denied the claim and payment as it concluded that the requested relief was not warranted. This denial created a dispute under the contract. Because the contract provides a mechanism for relief, the contractor has not established a breach that would suggest relief apart from the provisions of the contract.

Under the Changes and Changed Conditions clause, the contracting officer shall make an equitable adjustment if latent physical conditions differ materially from those indicated in the contract and the conditions increase or decrease the costs of, or time required for, performing the work. Relief is predicated upon conditions that “differ materially”—suggesting that every variation might not qualify for relief; e.g., if the variation is not material. For example, the bolt size variation here, the actual 1/2-inch bolt in the concrete frame compared to the depicted 5/8-inch bolt in the diagram, has not been shown to be material because the contractor was to remove the existing bolts and replace them with 5/8-inch bolts. The contractor would need to ensure the suitability of the concrete for the new bolts, at the existing or a different location. The contractor has not identified an increase in particular extra work or expense, if any, that would be associated with the change of locations.

What is material here is the recognition that the bolts were in a different location, as it required a pause and determinations by the contractor and agency. The agency is misguided when it suggests that the notice of non-conformance indicates a contractor error. The new gate was designed according to the diagrams the agency provided with the contract. What was non-conforming was the existing frame and gate. The initial “fault” rested with the agency, not the contractor. The variation qualified as a change under the contract.

In response to the variation in bolt locations, the contractor attempted to change the bolt size. That was not caused by the variation or the agency. That proposed change was inconsistent with the contract, the engineering support of the gate manufacturer, and the bolts

provided with the gate. Similarly, the contractor's suggestion that it intended to utilize the existing bolts may be correct but that intent is inconsistent with the contract requirements and pricing and the gate manufacturer's inclusion of new bolts to be installed.

Appropriately, the agency rejected the contractor's proposed change. It took time on the part of the agency and the contractor to sort out that the smaller bolts were not acceptable. Performance would have moved forward, and been completed, before rain delays had the contractor not proposed the variation.

As found, the changed conditions were material to the extent of several days. The compensable delays resulted in added costs to the contractor of \$5000. The contractor is to recover this amount.

Decision

The Board **GRANTS IN PART** the appeal. The agency is to pay the contractor \$5000, plus interest pursuant to the Contract Disputes Act, 41 U.S.C. § 7109, calculated from May 17, 2022, the date the contracting officer received the claim, until paid.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge