BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of DEWEY JORDAN, INC.	)	
	)	Docket No.
Under SHA Contract No. AA-220-502-572	)	MSBCA 1569
	)	

December 2, 1991

Equitable Adjustment - Anticipatory profit is not recoverable as part of an equitable adjustment for a deductive change pursuant to the changes clause of the contract.

APPEARANCES FOR APPELLANT: Howard G. Goldberg, Esq.
Donald Whitehead, Esq.
Smith, Somerville & Case
Baltimore, MD

APPEARANCE FOR RESPONDENT: Dana A. Reed
Assistant Attorney General
Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its claim by the State Highway Administration (SHA) for an equitable adjustment arising out of the deletion by SHA of certain work involving the provision of a substantial quantity of Type 1 Borrow.

Findings of Fact

1. Appellant entered into the subject contract in November of 1986 for construction of I-195 beginning south of the Patapsco River to south of Maryland Route 295 in Anne Arundel County,

Maryland. The project required placement of large quantities of Type I and Type II borrow to be used as earth fill.

2. Bid Item No. 2006 in the Schedule of Prices included in the contract documents provided for an estimated quantity of 1,587,171 cubic yards of Type I borrow excavation.

3. Appellant's bid price for Bid Item No. 2006 (Type I borrow) was $5.38 per cubic yard based on a quote of $4.78 per cubic yard (subsequently reduced to $4.70 per cubic yard) provided by Appellant's earthwork subcontractor, Potts & Callahan (P&C).

4. P&C had based its price to Appellant for the Type I borrow upon the cost of supplying borrow to various areas of the project from the following sources:

¶285

Source	Quantity[1]	Cost/c.y.
Dorsey Road Pit	50,000 c.y.	$4.34
Button's Pit	450,000 c.y.	$4.01
Cell #3 Pit	500,000 c.y.	$5.86
Beltway Pit	250,000 c.y.	$3.79

5. After contract award, SHA, pursuant to "Red Line Revision No. 7," unilaterally modified the contract relative to the northern end of the project to delete work consisting of flood plain fill to support the proposed highway. The deletion was necessary as a result of post award designation by the Corps of Engineers of a portion of the proposed highway construction area as wetlands. In lieu of the proposed highway construction, the Corps required SHA to extend by 680 feet an elevated bridge being constructed by another contractor. This elevated bridge extension deleted 680 feet of the total 1300-1350 feet of roadway in the northern end of the Appellant's project. Appellant declined to enter into competitive negotiations with the neighboring bridge contractor to perform this substituted 680 feet of bridge work in the area of the deleted work. At the time of the deletion, SHA also gave Appellant the option of keeping the 620-670 feet of roadway not affected by the bridge extension (involving 57,548 cubic yards of Type I borrow) in its contract. Appellant declined on grounds of lack of access and cost inefficiencies associated with performing this remaining highway work now physically separated from the remainder of the project. However, the record does not support either lack of access to this area or the asserted inefficiencies, and the Board finds that the 57,548 cubic yards involved is not properly treated as deleted work.[2]

---

[1] P&C's bid documents are based on the original required quantity of 1,250,000 cubic yards. A later addendum raised the quantity to 1,587,171. P&C bid was premised on P&C supplying the entire contract quantity of Type I borrow.

[2] The parties also dispute whether SHA should be given credit for 43,050 cubic yards of Class 5 excavation consisting of river bottom material located on the south side of the Patapsco River.

6. Prior to Red Line Revision No. 7 being issued, P&C was informed by one of their clients that they had approximately 160,000 cubic yards of excess material suitable for Type I borrow at a housing development known as "River Chase". This material was located in close proximity to the fill area ultimately deleted. P&C received confirmation of the availability of 160,000 cubic yards of excess fill at the River Chase project along with test results indicating that the fill would meet the State's specifications for Type I borrow. P&C then did a bid calculation and determined that the Type I borrow available from the River Chase project could be supplied to the northern end of the project at a unit cost of $3.02 per cubic yard. The remainder of the fill requirements for the northern end of the project were to be supplied from the Beltway Pit at a unit cost of $3.79 per cubic yard.

7. As a result of the deletion of the work involving 680 feet of roadway, which deletion the Board finds constituted a change to the contract, the quantity of Type I borrow to be supplied to the northern end of the project was reduced by approximately 225,704 cubic yards.

8. Appellant does not assert that SHA breached the contract by deleting the northern work and the record reflects that such deletion was an action taken in good faith by SHA to comply with post contract award requirements imposed by the Corps of Engineers.

9. Appellant does assert as the basis of its claim and appeal that the deletion of the work constituted a deductive change order pursuant to which P&C allegedly incurred $373,892.64 in lost anticipated profit measured by the difference between the anticipated actual cost to P&C of supplying the deleted fill from River Chase and the Beltway Pit and its bid price to Appellant.

10. Appellant also asserts that it reasonably incurred $6,040.00 in administrative and overhead expenses in the prosecution of the claim on behalf of P&C.

The Board resolves this dispute in Appellant's favor.

Decision

SHA asserts that the Appellant's claim is one governed by the Variations in Estimated Quantities clause of the contract (GP-4.03) and thus barred because the 225,704 cubic yard decrease in estimated quantity of Type I borrow under Bid Item No. 2006 occasioned by Red Line Revision No. 7 was less than 25%.[3] We find, however, that the Variation in Estimated Quantities clause is not intended to apply to work that is specifically deleted from a contract. The estimated quantities clause is intended to apply to work that is completed yet requires substantially more or less of a particular estimated quantity of matter necessary for the work. The contract clause applicable to the deletion of work herein is the changes clause.[4]

COMAR 21.07.02.02 sets forth the mandatory changes clause for construction contracts in relevant part as follows:

> "(1) The procurement officer unilaterally may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make any change in the work within the general scope of the contract,including but not limited to changes:
>
> (a) In the specifications (including drawings and designs);
>
> (b) In the method or manner of performance of the work;
>
> (c) In the State-furnished facilities, equipment, materials, services, or site; or

---

[3] Under the Variation in Estimated Quantities clause applicable to Maryland State construction contacts as set forth in COMAR 21.07.02.03, an equitable adjustment for a variation in quantity may only be considered where the variation is above 125% or below 75% of the estimated quantity.

[4] The deletion of the work herein constituted only a small percentage of the total work. The deletion could be viewed as constituting a partial termination for convenience under the termination for convenience clause required by COMAR 21.07.02.09 for construction contracts. We have determined that the changes clause more properly applies to the deleted work herein.

(d) Directing acceleration in the performance of the work.

"(2) Any other written order or an oral order, including a direction, instruction, interpretation or determination, from the procurement officer that causes any such change, shall be treated as a change order under this clause, provided that the Contractor gives the procurement officer written notice stating the date, circumstances, and source of the order and that the Contractor regards the order as a change order....

"(4) Subject to paragraph (6), if any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly....

Under the changes clause a contractor is entitled to an equitable adjustment for a change that increases its costs. The contractor must show how its reasonable costs of performing the work as changed differed from the reasonable costs of performing the work as originally required. Corman Construction, Inc., MSBCA 1254, 3 MSBCA ¶206 at 24 (1989); Granite Construction Co., MDOT 1014, 1 MSBCA ¶66 at 33 (1983). The focus is on the impact of the State's change on the contractor's costs, and the contractor must prove that any increase in costs is attributable to the State's actions. Hardaway Constructors, Inc., MSBCA 1249, 3 MSBCA ¶ 227 at 72-73 (1989); J. Cibinic and R. Nash, Administration of Government Contracts at 481 (2d ed. 2d printing 1985). An equitable adjustment is awarded to make the contractor whole for costs incurred as a result of a change, and not to give the contractor compensation for work not done. See, Cherry Hill Construction, Inc., MSBCA 1352, 2 MSBCA ¶197 at 19, n.8 (1988). In the instant appeal work was deleted and Appellant did not incur whatever costs would have been involved in its performance. The record also reflects that the work was deleted before Appellant incurred any start up costs relative thereto. Nevertheless, citing cases (e.g. ACS Construction Co., Inc., 87-1 BCA ¶19,660 (1987)) in which the government sought a credit from the contractor for deleted work, Appellant asserts it is entitled to the anticipated profit it would

have realized had the work not been deleted as the basis of its loss on the theory that it is entitled to offset the anticipated profit on the least expensive deleted work against the more costly work that was not deleted. It argues that prior to the deletion P&C was to be paid its bid price of $4.70 per cubic yard to supply Type I borrow to the area deleted. The cost to P&C to supply the area deleted, including overhead and profit, was $3.79 for Type I borrow coming from the Beltway Pit and $3.02 per cubic yard from the River Chase project. P&C then asserts it is entitled to be compensated for the difference between its bid price ($4.70) and its estimated cost to supply the borrow based on a melded rate of $3.38 for the River Chase and Beltway Pit sources multiplied by the amount of borrow it claims was deleted (283,252 cubic yards) for a total equitable adjustment of $373,892.64.

As we have noted, however, an equitable adjustment is awarded to make the contractor whole for costs incurred as a result of a change, and not to compensate the contractor for work not done. We reject Appellant's theory that anticipatory profit on deleted work is the proper measure of an equitable adjustment where the deductive change eliminates the least costly portion of an item of work, at least absent evidence that the deductive change was willfully calculated to deny Appellant profit reasonably anticipated on the deleted work. There is no evidence in this appeal of willful breach by SHA. The deletion was a good faith action by SHA necessitated by the acts of a third party. Thus any predicate for considering the appropriateness of an award of anticipatory profit as part of an equitable adjustment (assuming arguendo that loss of anticipatory profit may be considered as legitimate damages under the General Procurement Law) is missing. SHA did not deliberately take away the least costly part of the work and force P&C to do the most costly part of the work thus depriving P&C of profit which it could have "offset" against the higher cost of work.

Sha concedes that Appellant is entitled to its increased costs and a reasonable profit thereon, resulting from the impact of the

deleted work. The deletion of work may have resulted in quantifiable loss of efficiencies in performance of other work not deleted. It is also possible that the deletion may have impacted P&C's costs relative to provision of the Type I borrow because P&C had fewer units over which to spread its fixed costs. Appellant has never provided SHA with any such cost information, proceeding as it has on an anticipatory profit theory. Appellant's costs of $6,040.00 incurred in pursuing this theory are denied. However, Appellant would be entitled to any increased overhead costs directly related to the performance by P&C of the work as changed by the deletion. The case is therefore remanded to the SHA procurement officer in order to permit the Appellant to present evidence of any actual increased costs that the deleted work may have caused consistent with the principles outlined in this opinion.

Dated: December 2, 1991

Robert B. Harrison III
Chairman

I concur:

Sheldon H. Press
Board Member

Neal E. Malone
Board Member

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1569, appeal of DEWEY JORDAN, INC., under SHA Contract No. AA-220-502-572.

Dated: December 2, 99

Mary F. Priscilla
Mary F. Priscilla
Recorder