DURAN CONSTRUCTION COMPANY,	)	**AGBCA No. 1999-171-2**
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	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

January 13, 2000

Before VERGILIO, Administrative Judge.

Opinion for the Board by Administrative Judge VERGILIO.

On June 28, 1999, the Board received this appeal from Duran Construction Company (contractor). The respondent is the U. S. Department of Agriculture, Forest Service (Government). The dispute involves a contract, No. 50-0109-6-00345, which obligated the contractor to construct a warehouse and other structures for the Hoonah Ranger District on the Chatham Area of the Tongass National Forest in Hoonah, Alaska. What is before the Board are nine issues which the contracting officer denied (in whole or in part) by decision in response to the contractor's claim.

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as amended. By submission dated, and received by the Board on, August 16, 1999, the contractor elected the small claims (expedited) procedures, such that this is a decision by one judge, which is final and conclusive and shall not be set aside except in cases of fraud. The decision shall have no value as precedent. 41 U.S.C. § 608; Rule 12. The parties have submitted the case pursuant to Rule 11, without a hearing. The parties elected to not submit briefs,

instead opting to engage in a telephone conference with the Board judge deciding the matter to discuss factual and legal issues, prior to the issuance of this opinion.

The contractor pursues nine issues in this appeal. The nine areas relate to the installation of perimeter insulation, additional work to recess perimeter insulation, the relocation of a cement pad, work on a sewer line, overhead doors, access doors, firewall construction, a stop work order, and a general allegation of Government improprieties seeking an amount "to be determined at trial not to exceed" $10,000,000.

The general allegation of the contractor does not constitute a claim. In five of the areas, the Government insisted on performance in accordance with the terms and conditions of the contract; therefore, the contractor is not entitled to relief. While the Government changed one requirement for the overhead doors, the record does not demonstrate that the contractor incurred additional costs to accomplish the change. The Government required the contractor to engage in additional, compensable work regarding the cement pad and the sewer line, for which the contractor is entitled to its demonstrated costs, plus overhead and profit. Accordingly, the Board grants in part this appeal.

FINDINGS OF FACT AND DISCUSSION

The contract

1. With an effective date of September 26, 1996, the Government awarded a contract, No. 50-0109-6-00345, to Duran in response to a negotiated procurement (Exhibit 4.8 at 734) (all exhibits are in the appeal file). The project requires the construction of a warehouse and covered parking buildings in Hoonah, Alaska, at the Hoonah Ranger District Administrative Site, Tongass National Forest, on Chichagof Island (Exhibits 4.8 at 758 (¶ C.1), 4.9.2 at 867 (¶¶ 100-1.1, -1.2)). The award price of the contract is $426,900 (a lump sum based upon the sum of various items), with work to be performed within 300 calendar days of the contractor's receipt of the notice to proceed. (Exhibits 3.3, 4.8 at 734, 744 (¶ 10)).

2. The contract requires that the "site and building shall be designed to conform to the drawings and specifications provided by the government and to meet the specific site conditions" (Exhibit 4.9.2 at 872 (¶ 300-3.1.A)).

3. The contract contains alternate I of the Specifications and Drawings for Construction clause from Federal Acquisition Regulation (FAR) 52.236-21 (APR 1984) (Exhibit 4.8 at 773-75). Paragraph (f) directs that if contractor-provided

> shop drawings show variations from the contract requirements, the Contractor shall describe such variations in writing, separate from the drawings, at the time of submission. If the Contracting Officer approves any such variation, the Contracting Officer shall issue an appropriate contract modification, except that, if the variation

> is minor or does not involve a change in price or in time of performance, a modification need not be issued.

(Exhibit 4.8 at 774-75.)

Perimeter insulation

4. The contractor seeks to recover $3,603.63, denied by the contracting officer, for providing and installing perimeter insulation (Exhibit 1.1 at 4-5).

5. The contract requires perimeter insulation (rigid, extruded polystyrene, of a given manufacturer or approved by the contracting officer) at the concrete floor (Exhibits 4.9.2 at 944-46, 4.9.3 at 1080). The contractor's engineer formulated plans which did not utilize the perimeter insulation in the design. With the submission of the plans, the contractor did not notify the Government of any deviation from contract requirements (Exhibits 1.1 at 4). By not providing notice of the deviation, the contractor acted contrary to the terms of the contract (Finding of Fact (FF) 3), such that the Government's approval of the plans does not relieve the contractor from complying with the contract. In requiring the contractor to install perimeter insulation (Exhibit 3.138), the Government did no more than insist that performance conform to the terms and conditions of the contract. The contractor has not demonstrated a basis for relief.

Recess of perimeter insulation

6. By letter dated August 31, 1998, to the contracting officer, the contractor submitted a claim for $712.50, relating to "drop perimeter insulation." The claim states that the contractor was required to recess perimeter insulation an additional 2 inches on doorways. The contractor had prepared the area previously, such that the claimed entitlement is for rework, as directed in a Government-issued work order. (Exhibit 3.367 at 606.) The work order references two items, one involves two areas where the insulation could be trimmed; the other involves a 24-square foot area to be recessed 3 inches to accommodate the insulation (Exhibit 3.367 at 608).

7. By letter dated February 1, 1999, to the contracting officer, the contractor amended the claim to seek $1,180, based upon 20 hours of labor to complete the work, 4 hours to process the matter and claim, and an added percentage for profit and overhead. (Exhibit 3.385 at 655.) The supporting documentation consists of certified payroll sheets, which are neither specific nor enlightening (Exhibit 3.385 at 656-57), and material relating to a different work order and apparent dispute for work and labor hours not identified in the claim (Exhibit 3.385 at 658-59).

8. Relying upon and referencing a daily diary (Exhibit 3.165 at 289), the contracting officer concludes that the contractor accomplished the work (raking out 3 inches of material in a 24 square foot area, and trimming insulation in two areas) with approximately 15 minutes of labor by one employee. The contracting officer largely denied the claim, stating:

> Your claim amount is grossly inconsistent with the COR's [Contracting Officer's Representative's] observations recorded on site at the time. None of your supporting documentation proves your claim. The payrolls do not tie the laborers to the work in question. The only contemporaneous documentation that addresses the level of effort expended in complying with the work order is the COR's diary which indicates the work took about 15 minutes. I will allow a total of 2 hours at $40 per hour plus overhead and profit for a total of $100.

(Exhibit 1.1 at 6).

9. The contractor maintains that it was required to recess an area of 256 square feet. The record does not support the assertions of the contractor, in terms of the area, the level of effort, or the labor hours. The contractor has not demonstrated that it is entitled to more than the contracting officer has allowed for this item.

Oil tank pad relocation

10. The contract requires the contractor to place and pour a reinforced 8-inch deep concrete pad to hold a 1,000 gallon, above-ground fuel oil tank. A drawing specifies: "verify location with contracting officer prior to placing foundation slab." (Exhibits 4.9.2 at 1039 (¶ 15480-3.1), 4.10 at 1095, 1099). Applicable code required that the tank be located a minimum of 5 feet from the building. (Exhibit 3.389 at 676-77).

11. The contractor initially poured the pad 1.5 feet from the building, which would not permit tank placement in accordance with code. (Exhibits 3.246 at 424, 3.269, 3.369 at 617). The Government required the contractor to relocate the pad (Exhibit 3.269). The contractor seeks compensation for costs it maintains were associated with the relocation (preparing the ground and dragging the pad).

12. Prior to the pour, in response to the contractor's request for verification of the pad location, the COR requested the Government inspector to locate the pad in accordance with plans and code requirements. The record lacks daily diaries for the days the inspector may have verified the location (September 17 and 18, 1997). The reports for the day of the pour do not specify that the pad placement was too close to the building. (Exhibits 3.141 at 247, 3.168, 6.2 at 1167.) Given the correspondence and lack of contrary, contemporaneous accounts, the Board finds that the contractor had obtained approval for the pad location prior to the pour, while the COR and inspector were aware of the setback requirement for the tank.

13. In a claim letter, dated August 31, 1998, to the contracting officer, the contractor seeks to recover $1,125 for relocating the pad. The contractor did not supply supporting documentation or an explanation of how it calculated the dollar figure. (Exhibit 3.369 at 617.)

14. By letter dated February 1, 1999, to the contracting officer, the contractor amends its claim to seek $1,792.94 to relocate the pad. This amount is calculated utilizing a backhoe and operator for 6 hours, 8.5 hours of other labor, 3 hours of labor to process the matter and claim, and a percentage for profit and overhead. The contractor has provided supporting documentation for the hours and costs, solely in the form of a "certified payroll" sheet with daily hours for individuals for 1 week and circled entries for two individuals for January 29, 1998. (Exhibit 3.388.)

15. The record supports the assertion that the contractor utilized 8.5 hours of labor to relocate the tank pad (Exhibits 3.310, 3.311); the record does not support the claimed hours and costs of a backhoe and operator as a separately incurred cost for this item, or the hours to process the matter. The Board concludes that the contractor should be reimbursed $326.08; this is for 8.5 hours at the hourly rates with fringe benefits identified in the payrolls and the percentage of profit and overhead claimed by the contractor and utilized by the Government.

Sewer clean out

16. At issue in this matter of dispute is whether the contractor initially installed a "y" connection (as required by the contract (Exhibits 4.9.2 at 897 (¶ 2720-3.3.A), 4.10 at 1095 (detail 6/1)) or a "t" connection. The contractor contends that it installed a "y" connection; the Government maintains that the contractor installed a "t" connection. The contractor re-excavated the area. The contractor contends that this re-excavation revealed a "y" connection; the Government contends it revealed a "t" connection.

17. The contract specifies, in the Inspection of Construction clause (FAR 52.246-12) (JUL 1986):

> If, before acceptance of the entire work, the Government decides to examine already completed work by removing it or tearing it out, the Contractor, on request, shall promptly furnish all necessary facilities, labor, and material. If the work is found to be defective or nonconforming in any material respect due to the fault of the Contractor or its subcontractors, the Contractor shall defray the expenses of the examination and of satisfactory reconstruction. However, if the work is found to meet contract requirements, the Contracting Officer shall make an equitable adjustment for the additional services involved in the examination and reconstruction, including, if completion of the work was thereby delayed, an extension of time.

(Exhibit 4.8 at 761 (¶ E.2(h)).)

18. In an amended claim, dated February 1, 1999, to the contracting officer, the contractor seeks to recover $1,741.14 relating to the alleged extra work. The amount is comprised of a backhoe with operator for 5 hours, 6.5 hours of other labor, 8 hours of labor to process the matter and claim, and a percentage for profit and overhead. The contractor has provided supporting documentation for the

hours and costs, solely in the form of a "certified payroll" sheet with daily hours for individuals for 1 week and a circled entry for one individual for September 16, 1997. (Exhibit 3.386.)

19. Sworn statements from each side are conflicting as to what was initially installed and what was unearthed (Exhibits 6.2 at 1168-71, 7.2 at 1180-81). The Government's position is inconsistent with its actions and the contemporaneous reports in the record. The Board finds that the contractor initially installed a "y" connection. The Board concludes that the Government is obligated under the contract (FF 17) to make an equitable adjustment for the additional services involved.

20. The record supports the assertion that the contractor utilized 6.5 hours of labor to examine and complete the work (Exhibit 3.386); the record does not support the claimed hours and costs of a backhoe and operator as a separately incurred cost for this item, or the hours to process the matter. The Board concludes that the contractor should be reimbursed $249.36; this is for 6.5 hours at the hourly rate with fringe benefits identified in the payrolls and the percentage of profit and overhead claimed by the contractor and utilized by the Government.

Overhead doors

21. Section 8360 of the contract "specifies overhead section garage doors as shown on the drawing" of the contract (Exhibit 4.9.2 at 961 (¶ 8360-1.1.A)). One item identified in the general description of the product is door sections: "Nominal 1-3/4" thick, polystyrene core insulation, 1/8" industrial exterior hardboard facings" (Exhibit 4.9.2 at 961 (¶ 8360-2.1.G)). The drawings contain a "door schedule," which describes the overhead doors as made of hollow metal, without the word "insulated," which is used to describe other doors (Exhibit 4.10 at 1096).

22. The general description references glass, "manufacturer's standard" (Exhibit 4.9.2 at 961 (¶ 8360-2.1.H)). The contract also contains direction on the execution and fabrication of the overhead doors, specifically: "Fabricate to the size shown with optional glass sections" and "Set glass in a putty bed with glazing stops on inside of door" (Exhibit 4.9.2 at 962 (¶ 8360-3.1)).

23. By letter dated August 31, 1998, the contractor submitted a claim to the contracting officer, seeking to recover $575. The contractor maintains that it provided metal, insulated doors with a panel of windows, as required by the COR, but not by the contract. (Exhibit 3.371.) By letter dated February 1, 1999, to the contracting officer, the contractor provides a cost breakdown for the $575 figure ($300 for material, $160 for 4 hours of labor to process the matter and claim, and $155 for profit and overhead as a percentage of the other amounts) (Exhibit 3.391 at 682). The supporting documentation consists of the original proposal from the door supplier/installer with a $6,000 price, and the revised price of $6,300, with $6,000 for the insulated door and $300 for the glass and a bar (Exhibit 3.391 at 683-84).

24. The contractor paid no more for the insulated, metal doors than for the doors it initially proposed to provide. The sole basis of the price increase relates to the glass. The silence in the drawings regarding the requirement for glass does not create an ambiguity. The specifications make explicit the need for glass. (The Order of Precedence clauses in the unmodified contract, which

themselves conflict, do not alter the contractor's obligation to provide doors with windows, as explicitly required by the specifications.) Regarding the glass, the Government required no more than the contractor required. Therefore, the contractor is entitled to no recovery for this item.

Access doors

25. The contractor seeks $690.95, for the installation of fire-rated access doors. The contract called for non-fire-rated doors, which the contractor installed. Thereafter, the Government required the contractor to replace those doors with fire-rated doors. The contractor submitted its request for $690.95, with supporting invoices. The contractor incorrectly sums the invoices. (Exhibit 3.383.) The corrected total is $578.45, for which the contracting officer found entitlement (Exhibit 1.1 at 13). The record contains no basis to increase this figure, the contracting officer's calculations are correct.

Firewall

26. The contract requires the installation of a prefabricated metal building system with metal curtain wall panels (Exhibit 4.9.2 at 991 (¶ 13800-2.2.A)). The contractor did not provide a metal wall where two units adjoined between the general storage and inside parking areas. The Government required the contractor to make the connecting wall fire-rated to comply with the Uniform Building Code. The contractor incurred costs, for which it seeks compensation. (Exhibit 1.1 at 14-15.)

27. The contractor's initial work did not comply with the contract. The contractor's failure to comply with contract (including building code) requirements led to it incurring additional costs. The Government is not obligated to reimburse the contractor for such a contractor-caused change.

Stop work order

28. The contract dictates that the erection of the prefabricated metal buildings shall be by an erector certified by the building manufacturer or the contractor shall make arrangements to have the building manufacturer's representative on the site at four specific times, that is, at the beginning of four events: steel frame erection, wall panel erection, roof panel erection, and installation of trim and accessories (Exhibit 4.9.2 at 993 (¶ 13800-3.2.A)).

29. The contractor submitted a claim to the contracting officer, by letter dated February 1, 1999, to recover $1,495.10 for equipment down-time and other costs, which the contractor deems it incurred because of an unjustified stop work order issued on October 15, 1997 (Exhibit 3.393). The contractor continued working, despite the stop work order (Exhibits 3.213, 3.215, 3.216, 3.217). Therefore, the requested recovery is not warranted. Also, the stop work order was justified, given that the contractor was not compliant with the contract requirements described above (FF 27); the presence of a manufacturer's representative at the unloading of the material and assembly of materials before being raised from the ground does not equate to the beginning of the steel frame

erection. (Exhibits 4.9.2 at 993 (¶ 13800-3.2.A), 3.196, 3.210, 3.393.) Therefore, the Board denies this aspect of the claim.

Additional contractual allegations

30. The contracting officer has also denied a contractor request to be paid an amount "to be determined at trial not to exceed" $10,000,000 for what the contractor describes as racial prejudice; the use of authority in an arbitrary and capricious manner, which interfered with and delayed performance; and the tortious interference with the contractor's bonding company (Exhibits 1.1 at 19, 3.382). The contractor did not make the request as a claim cognizable under the CDA, 41 U.S.C. § 605, as amended. Hence, this matter is not properly before the Board.

DECISION

The Board grants in part the appeal. The contractor is entitled to $575.44, with interest pursuant to the CDA, 41 U.S.C. § 611.

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JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
January 13, 2000