BIG SKY CONTRACTORS, INC.,	)	**AGBCA No. 1999-190-2**
	)	
Appellant	)	
	)	
Representing the Appellant:	)	
	)	
J. R. Erickson, President	)	
Big Sky Contractors, Inc.	)	
P. O. Box 1446	)	
Libby, Montana 59923	)	
	)	
Representing the Government:	)	
	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

January 12, 2000

Before POLLACK, Administrative Judge.

Opinion for the Board by Administrative Judge POLLACK.

This appeal arises out of a dispute over Contract No. 50-03J1-5-0070, Reconstruction of Wolf Creek - Portal Road 36 between the U. S. Department of Agriculture, Forest Service, Libby Ranger District, Kootenai National Forest (FS or Government), Montana, and Big Sky Contractors, Inc. (Appellant) of Libby, Montana. The contract was awarded on June 19, 1995, in the sum of $99,500. (Appeal File (AF) 12.) The contract bidding was done on the basis of line items. Among the items was Item No. 410 (02) GT, Aggregate, Grading C (Chips). This was set out as a Design Quantity (DQ) with an estimated tonnage of 128 tons. Appellant bid this item at $10 per ton.

The Board has jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. Appellant has elected the Expedited Procedure and the parties have each waived a hearing. Under the Expedited Procedure, which is not precedential, a decision is to be rendered

within 120 days of election. Election in this case was September 14, 1999, making the target date January 13, 2000.

The dispute involves whether the Appellant is entitled to be compensated for additional aggregate, whether the Appellant is entitled to $180 which it identifies as the overhead included in the deleted silt fence work of $1,200, and finally whether the Appellant is entitled to $60 for additional Corrugated Metal Pipe (CMP). There is no dispute over this last item, as the FS has included it in a modification but has not paid it since Appellant refused to sign the modification. The matter of the $60 was not part of the claim from which the Contracting Officer (CO) issued her decision and as such, we will not here decide a matter which appears simple for the parties to resolve. This decision, therefore, addresses two issues, the additional asphalt and overhead on the silt fence deletion.

FINDINGS OF FACT

1. After the job began the FS made certain changes in the contract. Among the changes, the FS deleted 300 feet of silt fence. The FS also added through Modification No. 1, signed by Appellant on August 10, 1995, the application of liquid asphalt (to be placed prior to application of the emulsified asphalt and the aggregate) to act as a sealer on the roadway. The designer did not include sealer in the original design. However, after the award of the contract, the FS learned in discussions with suppliers, that the liquid asphalt was needed to assure a proper job. In the justification for the modification as well as in the modification, the FS characterized the omission of the sealer as an error. The modification did not contain any costs for additional aggregate or chips and apparently neither party was aware that the liquid asphalt, because it changed the properties of absorption, would create a need for additional aggregate. (AF 14-17.)

2. As a result of the addition of the liquid asphalt, the Appellant had to add more chips and aggregate than originally called for to the roadway. This is not disputed. Further, the FS does not seriously dispute nor provide any alternative cost to Appellant's cost breakdown of $4,451 ($3,560.80 plus 25 percent as overhead and profit), which Appellant used to establish what it expended for all of the aggregate (the total tonnage including the original 128 tons). The parties do disagree over the total tonnage of aggregate used and that tonnage is important in order to calculate a unit cost per ton.

3. Appellant formalized its claim in its letter of October 25, 1995 (AF 10), asking for additional money associated with deletion of the silt fence and for the costs involved in adding the additional aggregate. The CO issued a decision dated May 10, 1999, where she allowed $198 for the silt fence but denied entitlement to the additional $180 overhead on the deleted line item. The $198 was comprised of $180 in costs and an additional $18 for profit. As to the additional aggregate, the CO denied that claim stating that since it was a design quantity, payment was controlled by the DQ clause. That clause provides:

> (1) **Designed Quantities (DQ)**. These quantities denote the final number or units to be paid for under the terms of the contract. They are based upon the original design data available prior to advertising the project. Original design data include the preliminary survey information, design assumptions, calculations, drawings, and the presentation in the contract. Changes in the number of units SHOWN in the SCHEDULE OF ITEMS may be authorized under any of the following conditions:
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> > (i) As a result of changes in the work authorized by the Contracting Officer.
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> > (ii) As a result of the Contracting Officer determining that errors exist in the original design that cause a pay item quantity to change by 15 percent or more.
> >
> > (iii) As a result of the contractor submitting to the Contracting Officer a written request showing evidence of errors in the original design that cause a pay item quantity to change by 15 percent or more. The evidence must be verifiable and consist of calculations, drawings, or other data that show how the designed quantity is believed to be in error.

4. In denying the claim for the aggregate, the CO said that the change in the number of tons of aggregate was not authorized since the additional aggregate (1) did not result from changes in the work authorized by the CO; (2) was not the result of the CO determining that errors existed in the original design that caused the pay item quantity to change by 15 percent or more; or (3) was not the result of the contractor submitting to the CO a written request showing evidence of errors in the original design that caused the pay item quantity to change by 15 percent or more. The CO then concluded, "Mr. Erickson did not submit any proof that errors existed in the original design, therefore, he is not entitled to any additional compensation." (AF 8, 92-93.)

5. While the FS does not confirm that 13 loads were used, its CO's Representative (COR) does not appear to seriously question the subcontractor's count of 13 truckloads. As to the disagreement over whether the trucks carried 10 cubic yards (cy's) as claimed by the FS or 12 as claimed by the subcontractor, the 12 cy's of heaped material appears to be the more accurate figure. Again, we have no reason to doubt the credibility of the subcontractor who reported the 12 cy's and on this disagreement we accept the subcontractor's observations. Regarding the number of pounds per cy, this again appears to be an honest disagreement. Here, however, we find that the FS number of 2,367 pounds per cy to be the more accurate, because the FS derived its number from a specific industry standard (AF 170). We were provided no similar source or authority for the Appellant's weight figure. Accordingly, there were (13 loads x 12 cy's) x 2,357 pounds per cy for a total of 367,692 pounds. That converts to 183.8 tons. We recognize that other weights have been identified at different times by the parties, however, we find that the evidence best supports 183.8 tons. Taking

the agreed price of $4,451 and dividing it by 183.8 tons yields a unit price of $24.21 per ton for the entire project.

6. As to the silt fence, there was no factual dispute as to direct costs. The Government acknowledged that the posts and fence had been delivered and the parties agreed to price that at $180 and to add to that an additional $18 for profit. What remained at issue was whether the Appellant was entitled to an additional $180 which was 15 percent of the total for the deleted item of $1,200.

DISCUSSION

Appellant contested the CO's position on entitlement of the aggregate, claiming that it was entitled to the total cost it expended less the bid amount because the overrun exceeded the 15 percent variance prescribed by the Federal Acquisition Regulations (FAR) 52.212-11, the standard Variation in Estimated Quantities clause (VEQ). Under Appellant's approach, it repriced this contract item and made aggregate a cost reimbursable item.

In the brief filed by the FS in this proceeding, the FS has acknowledged that some recovery is due. The FS position set forth in the brief is that the overrun is controlled by the Variations in Estimated Quantity clause in conjunction with the DQ clause and therefore the Appellant is only entitled to recover the excess of 15 percent at a new unit price and to recover the remaining difference at the unit price of $10. The FS makes other arguments associated with the VEQ clause that leads it to contend that at best even the amount over 15 percent should be $10 per ton.

Appellant is entitled to compensation for the additional material under subparagraph (i) of the DQ clause, which specifies that changes may be authorized as a "result of changes in the work authorized by the Contracting Officer." The additional aggregate chips were the byproduct of a change to the contract involving the addition of a sealer on the roadway. At the time of the design the FS thought the sealer would not be needed but was later convinced, that it was needed. The FS position, taken in the final decision, that this was not a change, simply is erroneous. Further, the FS attempted in its brief to accept some responsibility under the VEQ clause is also misplaced.

As we pointed out recently in J & D Services of Northern Minnesota, Inc., AGBCA No. 98-126-1, 99-2 BCA ¶ 30,478, the DQ clause is different from the VEQ clause and as such, the cases provided by the FS which rely on the law surrounding the Variation clause are not applicable. Appellant's claim is based upon a change, not a variation in estimated quantity.

As to those portions of the DQ clause which deal with the 15 percent variation, these clauses deal with situations where there was a miscalculation or error in how the FS came up with the quantity. It essentially deals with a wrong formula, measurements or mathematical calculation. This was not such an instance, but rather, as noted above, is a change under the first paragraph of the clause.

As to the Appellant's arguments, which attempt to use the Variation clause to reprice the entire quantity, Appellant simply ignores the fact that the item in issue is a DQ. The Appellant entered into

a contract where it agreed to provide 128 tons at $10 a yard. The addition of aggregate in this case does not change that obligation.

We therefore find that Appellant is entitled to be paid for the additional quantity of 55.8 tons, the difference between 128 tons and 183.8 tons. That sum is an overrun and there is nothing in the DQ clause which limits Appellant to the unit price for the overrun or to any specific calculation or formula. In calculating the proper unit price for the overrun, we use the cost per unit of the additional tonnage and therefore multiply 55.8 x $24.21 for a total of $1,350.91 in additional compensation. That number includes overhead and profit. CDA interest will run from receipt by the FS of Appellant's October 1995 claim letter.

We now turn to the claim for 15 percent overhead on the $1,200 deleted from the contract. The mere deletion of an entire item does not necessarily result in the contractor being able to retain a portion of the costs bid for overhead. Simply stated, whether the Government must allow the contractor to retain some of the overhead depends on the particular facts, among which would be how the contractor priced its bid, to what extent the item and its value would relate to the overhead and a potential myriad of other factors. Here, Appellant has given us nothing but a demand for the item. We have no factual basis upon which to assess whether the overhead should not have been taken. To allow the claim would require pure speculation on matters which need to be known before a determination can be made. Accordingly, we deny that portion of the claim.

DECISION

Appellant is entitled to $1,350.91.

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HOWARD A. POLLACK
Administrative Judge

Issued at Washington, D. C.
January 12, 2000