TOLOFF CONSTRUCTION,	)	**AGBCA No. 95-227-3**
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Appellant	)	
	)	
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	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

January 30, 1996

OPINION BY ADMINISTRATIVE JUDGE SEAN DOHERTY

This appeal arises under Forest Service Contract No. 50-0109-5-00327 awarded March 10, 1995 to Toloff Construction. The contract was for furnishing and driving approximately 2,000 vertical linear feet of piling, approximately 110 pilings, across a marsh in the Portage Valley, Chugach National Forest, Alaska. The appeal is from a Contracting Officer's (CO's) final decision dated September 8, 1995 which addressed three claims. The claims were for $20,813.83 for provision of matting on which to operate pile-driving equipment; $2,478 for removal of frozen material; and $1,368 for extra survey costs. The CO denied the first two claims. The third claim was allowed in the amount of $780.

Appellant asserts in its Complaint that mats were required by a changed condition of thawing not contemplated in its bid. Appellant's second claim asserts it was unaware of the amount of material to be removed when agreeing to a modification to remove such material. Finally the Complaint asserts the disallowed survey costs include costs for 4 hours associated with restaking relative to the

moving of the matting and 2 hours waiting for instructions from the Forest Service.

The Government defends generally, asserting Appellant was required to perform the work under the terms of the contract as modified without additional compensation and, as to the 2 hours delay, either there was no delay or if any, it was not unreasonable.

The Board has jurisdiction pursuant to the Contract Disputes Act (CDA) (41 U.S.C. §§ 601-613). Appellant elected the Board's Accelerated Procedure (Board Rule 12).[1] In keeping with that procedure, this decision consists of summary findings and conclusions. The parties waived their right to a hearing. The appeal is decided on the written record.

FINDINGS OF FACT

1. Forest Service Contract No. 50-0109-5-00327 was awarded to Toloff Construction March 10, 1995 (Appeal File (AF) 94). The contract at Part I, Section A, (AF 91) stated in part at 10:

> THE GOVERNMENT REQUIRES PERFORMANCE OF THE WORK DESCRIBED IN THESE DOCUMENTS (Title, identifying no., date):
>
> IFB R10-95-11, Moose Flats Piling Installation, Chugach N.F., Work consists of furnishing and driving approx. 2,000 vertical linear feet of piling, approx. 110 pile, across a marsh in the Portage Valley. The pilings are to be installed while the ice is thick enough to support the installation equipment.
>
> * * * * *

2. The contract provided at (AF 102) DIVISION 1 - GENERAL; SUMMARY OF WORK 01010; PART 1 - GENERAL:

> 1.01 Scope: This project shall consist of the fur- nishing, and driving of approximately 1,700 vertical lineal feet of pipe piling, for approximately 105 individual piles. Piling will support approximately 304 ft. of boardwalk and 3 platforms (approximately 12 feet by 24 feet), at the abandoned Portage Valley Air Strip, at approximately Mile 1.4 of the Portage Highway. The pipe pilings are to be installed while the marsh/water is frozen and the ice is thick enough to support installation equipment.
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[1] The target date, January 24, 1996, was extended in view of delayed receipt of the parties' briefs as a result of Govern- ment furlough and weather shutdowns.

1.02 TIME FOR COMPLETION:

Installation of the pipe pilings will need to take place when the marsh/water is frozen, and the ice is thick enough to support the equipment needed to perform the work. Contract time will start soon after award. Work at the site will likely take place in April of 1995.

1.03 ICE THICKNESS:

The Contractor will be responsible for determining the ice thickness required to support the equipment to be used.

* * * * *

3. The contract provided at (AF 107): DIVISION 5 - METALS; STRUCTURAL STEEL 05120; PART 1 - GENERAL:

1.01 Scope: This section covers the installation of the steel pipe pilings. The contractor is responsible for furnishing all labor, equipment and materials required to fabricate the piles, perform pile layout, driving piles, and disposal of waste materials.

* * * * *

1.03 Construction Layout:

The Forest Service will flag or otherwise mark the center line of the boardwalk for snow removal. The Forest Service will establish reference points for staking the boardwalk and provide the Contractor with a set of stake out notes for the boardwalk. The Forest Service will establish the main axis of the viewing platforms and the fish platform. A Temporary Benchmark (TBM "X") will be established at each end of the boardwalk and at each platform location. The Contractor shall use the TBM to establish the top elevation of the piling.

The Contractor shall be responsible for removing the snow and for the actual layout of the piling locations. The Contractor shall be responsible for establishing the top elevation of the pilings. The Contractor shall be responsible for replacing any control points disturbed or lost. The Contractor can use any method (grid, template, etc.) to insure compliance with the tolerances listed below. The piling layout must be approved in writing by the COR before driving of any piles. The Contractor will be responsible for cutting off the piles to the elevation SHOWN ON THE DRAWINGS.

* * * * *

4. The contract provided at(AF 108): PART 3 - EXECUTION:

3.01 Driving Piles:

A. The contractor is responsible for determining all load calculations and methods of operation at the site and on/or adjacent to the frozen marsh/water surface. This is for protection of both the contractor's equipment and the natural resources.

* * * * *

5. The contract provided at (AF 109): PART 4 - MEASUREMENT AND PAYMENT:

4.01 A. Payment will be made for each completed piling that is shop-fabricated, painted, and installed at the site. The unit price should include all materials, equipment, and personnel necessary to install the completed pilings including drive shoes, welding/splicing, painting,[2] and any other items incidental to completing these bid items. Payment will be made based on vertical lineal feet of piling installed, measured from the tip of the pile to the bottom of the pile cap.

* * * * *

E. Layout of pilings for the boardwalk and plat- forms will not be measured for payment. This work will be considered incidental to furnishing and installing the piles.

* * * * *

6. The contract included (AF 115-116) standard provision F.3 SUSPENSION OF WORK (FAR 52.212-12) (APR 1984) authorizing the CO to suspend, delay, or interrupt the contract work if appropriate for

[2] The language here is as modified by an amendment to the solicitation issued prior to award (AF 96).

the convenience of the Government. The clause provides the con- tractor is to be compensated for unreasonable suspensions. The clause states claims shall not be allowed for costs incurred more than 20 days before notice in writing to the CO. Claims are to be submitted as soon as practicable but not later than the date of final payment.

7. The contract provided in SECTION G - CONTRACT ADMINISTRATION DATA (AF 117) AT G.1 CONTRACTING OFFICER'S REPRESENTATIVE:

> The Contracting Officer will designate a representative, hereinafter referred to as the Contracting Officer's Representative (COR) or, alternatively, as the Engineer, who will provide on-the-ground administration for the Government. The COR will be designated in writing and a copy of the designation will be furnished to the Contractor before or at the prework conference. The Contractor is cautioned to read the COR designation because certain authority under the contract is reserved solely for the Contracting Officer. The term "Contracting Officer" as used throughout the Specifications, shall be interpreted to include the Contracting Officer's designated representative(s) acting within the limits of their delegation of authority.[3]

8. The contract included (AF 119) standard provision H.4 DIFFERING SITE CONDITIONS (FAR 52.236-2) (APR 1984) which provides for an equitable adjustment in the event of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in the contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

9. The contract included (AF 119) standard provision H.5 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (FAR 52.236-3) (APR 1984). That clause states the Contractor acknowledges it has taken steps to reasonably ascertain the nature and location of the work including the uncertainties of weather, the conditions of the ground, and the character of surface and subsurface materials. The clause states that failure to take such steps does not relieve the Contractor of the obligation to perform the work without additional cost to the Government. The clause states further that the Government assumes no responsibility for representations by its agents before execution of the contract unless expressly stated in the contract.

10. Contract clause H.16 LAYOUT OF WORK (FAR 52.236-17) (APR 1984) (AF 125) states

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[3] The Board was not provided copies of any COR or Engineer designations.

the Contractor shall lay out its work from Government-established base lines and bench marks indicated on the drawings, and shall be responsible for all measurements in connection with the layout.

11. The contract included (AF 157) standard clause I.20 DISPUTES (FAR 52.233-1) (MAR 1994) ALTERNATE I (DEC 1991).

12. The record (AF 14) includes a note dated March 9, 1995 stating the Contractor would verify its bid and that the Contractor "Will rent mats if has to get thru [sic] swamp area." The CO states Government Exhibit (Govt. Ex.) 1 that in a March 9, 1995 discussion the Contractor stated he would send a bid verification. He also stated he would rent mats and had included matting in his bid. The CO indicated the point of the discussion was how the Contractor would deal with thawed/thawing conditions almost certain to be encountered. The Contractor in an affidavit of its president states the discussion was about using planks to get around isolated swampy areas as a much cheaper solution.

13. The Contractor wrote to the Government on March 10, 1995 stating (AF 16): "Our bid for the Moose Flats Piling job has been reviewed, and there weren't any errors found. If any more information is needed, please don't hesitate to call." The Contractor's affidavit states a crane was moved to the site in mid-March and snow was being removed by a subcontractor about March 15, 1995.

14. The COR maintained a CONTRACT DAILY DIARY (see generally; AF 18-40). The diary for March 30, 1995 indicates the prework meeting was that day (AF 18) and states some matting would be needed as the area was not frozen to support equipment. That diary entry stated the Contractor intended to bring additional decking for areas not frozen enough (AF 19). The diary for April 7, 1995 stated (AF 22) the need for matting constitutes a change and that a modification would be processed. The diary for April 8, 1995 indicated the COR requested an hourly rate for extra work/time associated with setting timber matting (AF 24). The diary for April 11, 1995 stated (AF 27) there was a discussion of the change and since costs were unknown a limit of $4,000 was set of which $2,000 had been spent. The April 21, 1995 entry (AF 38) referred to a discussion with the Contractor's bookkeeper regarding the cost limits and requesting a cost breakdown.

15. Appellant wrote to the COR April 3, 1995 stating (AF 20):

> The installation of the pilings for the Moose Flats job was to be installed while the ice was thick enough to support the installation equipment. Due to our unseasonable warm spring the ice isn't thick enough to hold our equipment.
>
> We propose to use equipment matts [sic] to support our equipment, while driving the piling. This is a changed condition to our contract. We are requesting an equitable adjustment for this condition.

16. The Contractor sent a facsimile (FAX) transmission to the COR April 24, 1995 stating prior discussion had been about a minor use of planks not used that were separate from the use of matting that was a substantial cost (AF 41). The transmission was accompanied by a claim invoice for $21,345.21 for matting (AF 42). The matting claim was revised to $20,813.83 May 5, 1995 (AF 46).

17. The COR completed final inspection noting only minor exceptions May 2, 1995 (AF 44).

18. Cost figures were submitted by the Contractor for labor for use of matting (AF 50-52). A memo written by the COR asserts the figures are reasonable and the work necessary (AF 53-54).

19. The COR, however, also asserted in a separate memo that a total of $4,000 had been set and if known that costs were exceeding that amount, deletions could have been made in the work (AF 55-56).

20. The record includes MODIFICATION OF CONTRACT No. 1 dated March 15, 1995 and signed by Daniel P. Toloff, owner, Toloff Construction, and by the CO for the Government. The modification added $2,200 to the contract. The modification stated in significant part (AF 89):

> Remove frozen muck pile located at viewing platform #2, including blading and shap[ing] of pond bank and area where pile was removed. Material shall be disposed as designated on the ground by the Engineer. This modification shall compensate contractor for all work, materials, labor and equipment associated with this change.

21. The COR's diary for April 11, 1995 reported a subcontractor was removing muck at viewing platform #2 and that the Contractor and Government checked the work at the end of the day, finding some additional work might be necessary to obtain the required depth (AF 28; see 29). Review of the record discloses no reference to additional work.

22. The record contains a June 27, 1995 memorandum to the COR from an "Agent" of Appellant (AF 68) asserting the Contractor and subcontractor were told the amount of marsh material to be removed was less than the actual amount and that it was only supposed to have been frozen a few

inches when in fact it was frozen completely through to the bottom of the material. The memorandum states amounts were determined only after the lump sum was determined and the modification issued.

23. The record includes a letter to the Forest Service from Conrad Contracting Co., the apparent subcontractor, dated July 5, 1995 (AF 73). The letter was signed by Marianne Van Keuren, Office Manager. The body of that letter states:

> This letter is to verify the facts set forth in Toloff Construction's letter to Rick Clark dated 6/27/95. When Mr. Conrad went to the site with Kent Cohay of the Forest Service, Mr. Cohay indicated that there was approximately 150-200 cubic yds to be moved, and that the material was only frozen a few inches deep. In reality Conrad Contracting hauled out 600 cubic yds of material, which was frozen all the way to the bottom. Our bid was based upon Mr. Cohay's original estimate, in that Mr. Conrad was never shown the procurement request.

24. In an affidavit of Appellant's owner submitted with Appellant's brief it is asserted Mr. Toloff visited the site in late February before bidding when the temperature was -10 degrees and the site was under 4 to 5 feet of snow and that the bid was based on installation in frozen conditions. The affidavit further states that on or about March 15, he agreed to the modification for removal of additional material on the representation that it was frozen 4 inches deep when in fact it was frozen to a depth of approximately 10 feet. The affidavit states the need for mats was due to warming conditions and the added survey costs of $1,368 were due to warm conditions and some relocation by the Government of pilings.

25. The record includes a memorandum addressed to the CO dated September 8, 1995 bearing the typed name Kent at the end. The memorandum denies any meeting by the author with Mr. Conrad or Mr. Toloff and states the author does not recall ever telling Mr. Conrad how much material was estimated to be at the site. (AF 82.)

26. Neither party to the appeal offered evidence as to conditions ordinarily encountered in marshes in the Portage Valley in April. Both parties included general references to conditions encountered without reference to specific conditions or actual evidence of any degree of thawing.

DISCUSSION

As noted above, this case is considered under the Board's Accelerated Procedure and therefore the discussion is somewhat abridged. However, the record was carefully reviewed and all arguments of the parties have been considered even though not fully discussed herein since we base our decision on matters considered to be controlling. Appellant has three claims which will be

considered in the following order:

1. $2,478 for removing additional dirt associated with modification No. 1.
2. $20,813.83 in costs for using matting.
3. $1,140 in increased cost of surveying.

CLAIM 1

Appellant entered into contract modification No. 1 March 15, 1995, without any reservation (Finding of Fact (FF) 20). A modification signed without reservation acts as an accord and satisfaction as to subsequent claims on the same basis. White Buffalo Construction, Inc., AGBCA Nos. 90-133-1, 90-178-1, 93-3 BCA ¶ 26,236. The modi- fication did not limit the volume of muck removal (FF 20). We are not persuaded by Appellant's after-the-fact statements that the work was limited to removal of 150-200 cubic yards (FF 22 - 26). (Compare circumstances where there was evidence the parties did not intend the modification to cover costs associated with certain work. Richards Construction Co., AGBCA No. 88-156-1, 94-1 BCA ¶ 26,384.)

CLAIM 2

Appellant asserts conditions indicated in the contract differed materially from those encountered during performance in that after award weather conditions changed drastically and there was unseasonably warm weather. Nothing more than allegations were offered in support of that assertion. The record contains general assertions as to the condition of freeze or thaw at the time of the work without specifics either as to what existed at any given time or location or what was normally to be expected during that time (FF 26). Allegations without more do not constitute sufficient proof. Craig Enterprises, AGBCA Nos. 92-183-1, 93-227-1, 95-2 BCA ¶ 27,766; C. Howdy Smith, AGBCA No. 90-154-1, 92-2 BCA ¶ 24,884.

The contract stated work was likely to take place in April of 1995 (FF 2). The record indicates the work was in fact performed in April (FF 14) although equipment was brought to the site and snow removed earlier (FF 13). Work was completed by May 2, 1995 (FF 17). Allegations of thawing (FF 15) do not indicate there was no ice or frozen material or the thickness/thinness thereof. Appellant's assertion in the first claim involves work performed on or after April 11, 1995 (FF 21) and alleges material was frozen 10 feet deep or to the bottom of that removed (FF 22-24).

When interpreted as a whole the contract required that the pilings were to be installed when the ice was thick enough to support the installation equipment (FF 1-2). The Contractor was responsible to select all equipment for driving the piles (FF 3). More specifically the Contractor was responsible to determine the ice thickness required to support the equipment to be used (FF 2).

Appellant offered no evidence as to the size of equipment used or actual ice conditions, whether mats

are customarily used in such circumstances and are considered part of equipment ordinarily supplied or whether other equipment could have been used without mats. The CO, in his decision, asserted smaller pile driving equipment could have been used. The evidence suggests that the cost of mats Appellant seeks to recover may have been included in Appellant's bid (FF 12).

Appellant argues it is excused from the responsibility of the contract because it encountered a differing site condition, asserting the area was reviewed in late February when the temperature was -10 degrees (FF 24) but that there was thawing in April when the work was performed.

The contract included clause H.4 DIFFERING SITE CONDITIONS (FF 8). The clause provides for an equitable adjustment in the event of (Type I) subsurface or latent physical conditions at the site which differ materially from those indicated in the contract, or (Type II) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract. Appellant cannot recover where it has not been shown conditions were other than should have been expected. Dore & Associates Contracting, Inc., AGBCA No. 92-236-1, 95-1 BCA ¶ 27,517; One Way Construction, Inc., AGBCA No. 93-193-1, 94-3 BCA ¶ 27,275. We find no evidence in the record on which a reasonably prudent bidder could conclude conditions of freeze or thaw found at -10 degrees in February would necessarily prevail in April. We find no other evidence to support a finding that either a type I or II differing site condition existed.

Appellant places great weight on the statements of the COR contained in the job diary (FF 14; see also 18, 19) indicating the need for matting constituted a change. The statements of the COR indicate a contract interpretation that we do not agree with and moreover we are provided nothing to identify the basis of his statements or the surrounding circumstances. Moreover, no evidence was offered to indicate the COR had authority to modify the contract or that there was a ratification of any agreement by the CO. The Federal Acquisition Regulation (48 CFR § 43.202) provides that change orders shall be issued by COs except when authority is delegated. The contract specifically cautioned that certain authority was reserved solely for the CO (FF 7). The Government is not bound by acts of its agents exceeding their authority. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). This proposition has been adhered to by this Board directly and in instances considering questions of estoppel. Spring Street Foundation, Inc., AGBCA No. 92-232-1, 94-2 BCA ¶ 26,737.

Appellant includes assertions of unusual weather. We do not find factual evidence of unusual weather in the record. We note generally that weather per se is not a differing site condition, and proof of unusual weather would entitle Appellant only to an extension of time, not additional money. Cannon Structures, Inc., AGBCA No. 90-207-1, 93-3 BCA ¶ 26,059; Rocky Mountain Constructors, Inc., AGBCA No. 82-256-1, 92-2 BCA ¶ 24,885.

CLAIM 3

The bulk of Appellant's claim for survey work is associated with claim two and is governed by the preceding discussion. A portion, or $780, was allowed by the CO as related to moves of piles caused by the Government. We do not set aside such conclusion. The remainder, or approximately $120, relates to an alleged delay by the Government of 2 hours. What would be considered a reasonable delay would depend on the facts of a particular case. Nevada Skylines, Inc., AGBCA No. 92-167-1, 92-3 BCA ¶ 25,089, affd. on reconsideration, AGBCA No. 92-233-R, 93-1 BCA ¶ 25,352. The parties offer equally credible evidence as to whether there was or was not any such delay. The contract provides for suspensions of work (FF 6) and allows compensation for unreasonable suspensions. No evidence was offered to show 2 hours of suspension, if they occurred, were unreasonable under the existing circumstances.

DECISION

The appeal is denied.

_____
SEAN DOHERTY
Administrative Judge

Concurring With Separate Opinion:

_____
EDWARD HOURY
Administrative Judge

Issued at Washington, D.C.
January 30, 1996

CONCURRING OPINION BY ADMINISTRATIVE JUDGE EDWARD HOURY

I concur that the appeal should be denied, and focus here only on the matting claim, which essentially turns on factual issues that the parties elected to have the Board decide on the written record without a hearing.

In order to protect natural resources, the contract required that the pile driving across the marsh be conducted while the ice was thick enough to support the equipment (FF 1, 2, 4). The work was to be accomplished in Alaska during the month of April (FF 2). The contract provided no indications of the expected ice thickness or thawing conditions, and placed on Appellant the responsibility for determining the ice thickness and whether it would safely support the equipment Appellant had the responsibility of selecting (FF 2, 3). The contract provided for increased costs, but only if the actual conditions encountered differed materially from those Appellant should have reasonably expected (FF 8).

Appellant had the burden to ascertain site conditions including the uncertainties of the weather (FF 9). While Appellant had the burden of proof, Appellant provided no evidence of the ice thickness, weather/thawing conditions, or equipment weight and ice stress conditions that it reasonably anticipated, or that it actually encountered. Consequently, we have no basis to conclude that actual conditions differed materially from those reasonably expected, or even whether they differed at all.

Appellant seeks to recoup the cost of matting used to distribute the weight of the equipment over the ice, but provided no evidence that the use of matting was unusual or unavoidable. The fact that the COR agreed there was a "change" to the contract (FF 14) is not persuasive, where evidence supporting the factual and legal basis for his conclusion, and his experience or expertise, was not made a part of the record.

On the other hand, the CO, in verifying Appellant's bid, discussed the need for matting to overcome thawing conditions that were likely to be encountered (FF 12). It is clear that such discussion occurred, although Appellant asserts the discussion concerned "planking" rather than matting (FF 12), a difference we have little basis to find relevant.

Moreover, the CO in his decision noted that Appellant used 97,000 pound equipment when smaller equipment was available. While this statement may not be entitled to any weight as evidence, it highlights the fact that Appellant had control over the selection of equipment, the method of operation, and that Appellant failed to provide adequate proof that the resulting ice stress conditions were materially different from what Appellant should have reasonably expected.