



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: January 24, 2007

CBCA 123

QUALITY FORESTS, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Cynthia Malyszek of Malyszek & Malyszek, Los Angeles, CA, counsel for Appellant.

Sarah M. Birkeland, Office of the General Counsel, Department of Agriculture, San Francisco, CA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **VERGILIO**, and **POLLACK**.

VERGILIO, Board Judge.

By letter dated June 24, 2004, Quality Forests, Inc., of Coeur d'Alene, Idaho (contractor), filed a notice of appeal regarding its contract, 53-91Z9-3-1-E06, with the Department of Agriculture, Forest Service (Government). The contract required hand grubbing of vegetation around conifer seedlings in the Scott River Ranger District of the Klamath National Forest, in California. The contractor had submitted to the contracting officer a certified claim to recover \$135,727.43, said to encompass costs based upon differing site conditions and work performed at the direction of the Government beyond that identified in the contract. Concluding that neither a type I nor a type II differing site condition existed, the contracting officer denied the differing site condition claim. Regarding the claim for additional work, the contracting officer noted that the parties had agreed that the contractor would remove material to outside the grubbed radius. The contracting officer

accepted the contractor's proposed price of \$66 per acre for each of the 100 acres on which the additional work was performed. The contracting officer approved payment in the amount of \$6600 as full compensation relating to the added work claimed by the contractor, and issued a unilateral contract modification increasing the contract price by \$6600 as well as interest on that amount. This appeal ensued.

Pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended (CDA), this Board has jurisdiction over the timely-filed appeal. The parties elected to submit the matter for resolution on the written record (without a hearing on the merits but with briefs), following the submission of the appeal file, complaint, and answer; telephone conferences with the presiding judge; and the development of the record.

Under the contract, the contractor was to grub areas around trees. The amount of vegetation that would be encountered and the level of effort to be expended were not dictated in the contract under which compensation was determined at fixed unit prices per acre. A preponderance of the evidence does not demonstrate that the encountered conditions are other than what a reasonable contractor should have anticipated. The contractor fails in its attempt to establish a differing site condition based upon the seeds in the soil, precipitation prior to proposal submission and contract performance, and variations in the vegetation when comparing what existed at the time of a fall survey to what existed during performance the following spring. Finding no differing site condition, the Board denies this aspect of the claim.

As originally signed, the contract permitted the contractor to leave grubbed material in place around the tree. At the request of the Government, for certain areas, the contractor moved the material to outside the grubbed radius. The contracting officer amended the contract to provide for payment at the contractor-requested unit price for the contractor-requested number of units. The record does not demonstrate that the contractor remains uncompensated for the additional work. Accordingly, the Board denies this aspect of the claim.

Findings of Fact

The Solicitation and Contract

1. The Government engaged in a negotiated procurement to obtain manual grubbing of vegetation in three-foot circles around conifer seedlings in the Scott River Ranger District in the Klamath National Forest in California. Appeal File, Exhibit 3 at 139-40 (all exhibits are in the appeal file). The technical requirements include the following:

- a. Hand grubbing shall be required within a 36-inch radius centered around each live, planted or natural tree at the spacing interval prescribed on the Unit Information Sheet (refer to Part III, section J). SEE ATTACHED UNIT INFORMATION SHEET FOR STAND DESCRIPTIONS.
- b. All live vegetation except conifers shall be completely severed below the root collar within the 36-inch radius. All conifers on specified spacing shall be grubbed. Spacing may vary up to 25 percent whenever doing so allows for the selection of a better quality crop tree. Variances shall not change the number of trees per acre to be grubbed. Conifers over 30 inches in height shall not require grubbing.
- c. Slash may be left within the 36-inch radius of any existing conifer as long as all forbs, grasses, brush, hardwoods, roots and vines two inches in diameter or less are pulled or grubbed at one half to one inch below the ground.
- d. The area one inch in radius from the bole of any conifer seedling shall not require grubbing or removal of vegetation.

Exhibit 2 at 84-85.

2. As initially issued, the “unit information sheet” (referenced in paragraph a. in the above quotation) in section J was a chart identifying two stands (each of five acres) under one line item, and seventeen stands of various acreage totaling 366 acres under a second line item. For each stand, the sheet indicates the acreage, the year last planted, the spacing interval, current tpa (trees per acre), tpa after interplant, and if there was or was not a need to interplant. Exhibit 2 at 103. A solicitation amendment replaced the unit information sheet with a page captioned “tentative grub 2003.” This expanded chart contains the same categories of information as in the original chart (with two variations in entries, each under current tpa, for two stands), as well as four additional categories of information for each stand: Hardwood (with a percentage and an average height), Brush (with a percentage and an average height), Grass/forbs Component (with a percentage), and Comments (identifying, if applicable, the time required to walk to the given stand). Exhibit 2 at 77, 102. The parties acknowledge that this data reflects documented field conditions observed during a reforestation stand examination in the fall of 2002. Exhibit 1 at 3, 6; Contractor’s Brief at 3 (¶ 9).

3. The solicitation and contract contain the Site Investigation and Conditions Affecting the Work (APR 1984) clause, 48 CFR 52.236-3 (1984):

(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, river stages, tides, or similar physical conditions at the site; (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

(b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

Exhibit 2 at 97.

4. The solicitation and contract contain the Differing Site Conditions (APR 1984) clause, 48 CFR 52.236-2. The clause states, in pertinent part:

(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of --

(1) Subsurface or latent physical conditions at the site which differ materially from those indicated in this 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.

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

Exhibit 2 at 97.

5. The solicitation and contract address crew organization and a daily production rate: "Contractor shall provide one non-working foreman and an adequate workforce to ensure a daily production rate of 7.5 acres per day." Exhibit 2 at 90. The solicitation and contract do not address the amount of vegetation that will exist to be grubbed at the time of performance or project a rate of performance for any individuals who may perform the grubbing. Upon inquiry prior to the submission of its offer, the contractor's president was told by the contracting officer's representative that the past progress rate had been .75 acres per person per day. Beyond being an oral statement not incorporated into the solicitation, the record does not indicate the vegetation existing when that progress rate was achieved or during what season or year, or under what requirements. Exhibit 1 at 2.

6. The contractor did not utilize the tentative grub schedule in section J, Finding 2, in formulating its offer and prices. The contractor relied upon the observations and estimates its foreman made after a site visit in mid-March 2003. The contractor anticipated very little grass to be grubbed, projecting a rate of performance of 1.25 acres per person per day. Exhibits 1 at 28, 3 at 216 (In reserving its claim on a contract release, the contractor states, "In bidding the job, I went by visual inspection of the job site."), 4 at 283. The contractor offered the lowest prices per acre. Exhibit 3 at 188.

7. Consistent with the solicitation, the Government awarded a contract with firm, fixed pricing, under which it would place task orders to obtain services. Exhibit 2 at 91 (¶ G.1), 125 (¶ L.2). That is, on April 2, 2003, the Government awarded a contract based upon the contractor's offer dated March 25, 2003. With an effective date of April 4, 2003, the Government placed the underlying order for a total of 408 acres to be grubbed, at a total cost of \$67,470, with 54.4 days to perform. The contractor attended a pre-work meeting on April 7, 2003. Substantive work began on April 8, 2003. Exhibit 2 at 78, 129-30, 184; Exhibit 4 at 251-52.

Performance

8. By letter dated April 15, 2003, the contractor informed the Government:

It is our intention to cover 12 to 15 acres per day, for 5 days a week. We know that we have fallen behind on schedule, and we are trying to do everything possible to get back on track. We know that we will. Our goal is to finish 60 to 75 acres per week. Unfortunately, unexpected things have happened since we bid the contract, such as the grass coming up so quickly. We apologize for any inconvenience this has caused, but know that we are trying our best to remedy the situation.

Exhibit 3 at 206.

9. During April and May 2003, the contractor and the Government discussed the slow rate of performance and possible causes. The contractor was encountering more grass than it had anticipated. In part, the contractor was clearing larger than required areas around the trees (scalps of greater than 3-foot diameters) and more trees per unit than required, thereby exceeding the contract requirements. Other potential factors in reducing the average rate of performance were the individuals (tree planters) utilized to perform grubbing and the tools that they were using, as well as periodic rework. Exhibit 3 at 206-07, 210, 222; Exhibit 4 at 252-53, 256, 264-65, 267, 270, 274-75.

10. On April 30, 2003, the Government and the contractor discussed a potential contract modification under the changes clause “due to the increased grass component of around 20% and what [the contractor] would want if [the Government] required [the contractor] to flip the severed grass clumps over within the scalps.” Exhibit 4 at 268 (contracting officer’s representative’s contract daily diary).

11. On June 9, 2003, the contracting officer’s representative and the contractor reviewed how each came up with the percentage of vegetation coverage in the handgrubbing stands. The contracting officer’s representative was left with the impression that the contractor determined that if there was vegetation within an area and the ground had to be scraped, the area was 100% vegetation covered. Also, during that meeting, according to the contracting officer’s representative, the contractor “agreed that it would take more time to remove thick vegetation verses a lighter cover but that double the vegetation would not take double the time to grub.” Exhibit 4 at 281. The contractor has placed into the record no evidence to contradict these statements, or regarding its basis for calculating percentages of vegetation coverage or associating the amount of work to the vegetation coverage.

12. On June 10, 2003, the contracting officer's representative met with the contractor. As of that date, grubbing had been completed on 382 acres of the 408 acres. During that meeting, the contracting officer's representative agreed with the contractor that the "[o]ver all total deviation including stands that remained the same is plus 28% cover." That is, the stated percentage of deviation is said to represent the combination of grass/forbs/brush/hardwoods above the sum of percentages as observed in the fall examination and noted in section J of the solicitation and contract (Finding 2). Exhibit 4 at 282-84 (contracting officer's representative's contract daily diary). With the contractor aware that the Board makes de novo factual determinations based upon the developed record, and taking as a given that the actual percentages of total vegetation increased by 28% between the fall forest examination and at some time(s) during performance, the contractor does not attempt to explain in the record how the increase either represents a deviation from what a reasonable contractor would expect or translates to additional effort by the contractor.

13. On June 13, 2003, the contractor completed performance. Exhibit 3 at 215.

The Disputes

14. The contractor provided the contracting officer with a certified claim dated September 10, 2003, which was received on September 15, 2003. The contractor seeks to recover \$135,727.43, said to encompass costs based upon differing site conditions and work performed at the direction of the Government beyond that identified in the contract. Exhibit 1 at 9-75. The contractor asserts that the quantity of vegetation encountered constitutes a differing site condition. Exhibit 1 at 16. The contractor also maintains that directions from the contracting officer's representative to completely clean scalps added work under the contract, which permitted severed vegetation to remain within the scalp. Exhibit 1 at 17. The contractor seeks to recover all of its alleged costs incurred in performing the contract and pursuing the claim. With this cost-reimbursement/total cost approach, the contractor does not differentiate between costs incurred relating to the alleged differing site condition and those related to the added work; it treats as compensable all costs said to be incurred related to the contract with no recognition of the fixed-price aspect of the contract. Exhibit 1 at 18-19.

15. The contracting officer issued a decision dated March 23, 2004. Concluding that neither a type I nor a type II differing site condition existed, the contracting officer denied the differing site condition claim. Regarding the claim for additional work, the contracting officer concluded that the parties had agreed that the contractor would remove material to outside the grubbed radius. The contracting officer accepted the contractor's proposed price of \$66 per acre for each of the 100 acres. The contracting officer approved

payment in the amount of \$6600 as full compensation relating to the added work claimed by the contractor. Exhibit 1 at 1, 6-7.

16. Unilateral contract modification one, with an effective date of March 23, 2004, specifies: "In accordance with FAR 33.211(h), \$6,600.00 has been determined payable under the Contracting Officer's Final Decision dated March 23, 2004. Such payment shall be without prejudice to the rights of either party. Interest on this payment will be computed from September 15, 2003." Exhibit 2 at 131. The evidentiary record does not demonstrate that this amount remains unpaid.

17. Within ninety days after receipt of the contracting officer's decision, the contractor filed a notice of appeal. After the submission of the appeal file, complaint, and answer, the parties developed the record, opting to make a submission on the record without a hearing. The evidentiary record closed. Briefs were submitted. Each party was given the opportunity to submit a supplemental brief, given the creation of this Board, to be received no later than January 16, 2007. Neither party filed such a brief.

Discussion

Given the shifting nature of the facts proposed and the legal arguments raised by the contractor, the Board first addresses the contract and relief available thereunder, in light of the above factual findings, and then the remaining allegations of the contractor.

Type I Differing Site Condition

Case law dictates that in order to establish entitlement to an equitable adjustment by reason of a type I differing site condition, "the contractor must prove, by a preponderance of the evidence, that the conditions indicated in the contract differ materially from those it encounters during performance" and that "[a] contractor cannot be eligible for an equitable adjustment for a Type I differing site condition unless the contract indicated what that condition would be." *H.B. Mac, Inc. v. United States*, 153 F.3d 1338, 1345 (Fed. Cir. 1998). The contract required the contractor to grub vegetation within a given radius around particular trees. The contract does not indicate the vegetation that will be encountered or express a level of effort required by the workers. The "tentative grub chart" reflects conditions recorded in the fall preceding proposal submission and performance. The record does not support the conclusion that the fall conditions would prevail in the months of performance (April through June). Although the solicitation and contract establish a minimum daily production rate, Finding 5, that rate is independent of the number of people employed, and, therefore, does not indicate the amount of vegetation that may be encountered or provide assurances that any level of effort will be sufficient for performance. The past

production rate revealed by the Government was not part of the contract. Neither the production rate nor the past performance rate indicate the site conditions that will be encountered.

Because the contract does not indicate the grubbing conditions or degree of vegetative growth that will exist at the time of performance, the contractor has not established the basis for a type I differing site condition.

Type II Differing Site Condition

The contractor bears the burden of establishing by a preponderance of the evidence that “the unknown physical condition must be one that could not be reasonably anticipated by the contractor from his study of the contract documents, his inspection of the site, and his general experience[,] if any, as a contractor in the area.” *Randa/Madison Joint Venture III v. Dahlberg*, 239 F.3d 1264, 1276 (Fed. Cir. 2001) (quoting *Perini Corp. v. United States*, 381 F.2d 403, 410 (Ct. Cl. 1967)).

Factually, the record does not support relief for the contractor. Because the contractor introduced no pertinent evidence, the record does not demonstrate that the actual vegetation and conditions differed from those ordinarily encountered in the spring in the local area. The variations from the contractor’s expectations and conditions in the fall do not demonstrate the unusual nature of the actual conditions. The contractor’s references to precipitation (dry then wet conditions) preceding performance as causes of the vegetative growth do not assist the contractor’s cause, as that information (general climactic information available to offerors prior to proposal submission) suggests that the contractor should have anticipated the growth of vegetation that occurred. Because the record does not demonstrate that the encountered conditions were of an unusual nature or should not have been anticipated, the contractor does not prevail.

In an initial brief (May 3, 2005), the contractor states that the first ten months of 2002 were very dry months, such that the reforestation stand examination was made during a time of severe drought. Further, the contractor states that significant rain occurred in the months of November 2002 through March 2003, inclusive. It contends that the unusual amount of rainfall after two years of drought constituted changed conditions that could not be foreseen and affected the vegetative growth and work under the contract. Contractor’s Initial Brief at 3-4. The supporting information demonstrates several months of below average rainfall, but does not demonstrate that yearly or particular deviations were out of the ordinary. Exhibit 6 at 293-95. Moreover, one need not “foresee” the rainfall that has preceded proposal submission. The contractor does not assert (or offer support for the proposition) that it was unaware of these local conditions that occurred prior to its proposal submission,

or demonstrate that for it not to consider such conditions that would directly affect the vegetative growth was reasonable. The Site Investigation and Conditions Affecting the Work clause (Finding 3) places the risks upon the contractor that the contractor now attempts to shift to the Government. Although the contractor makes reference to a Federal Register notice of October 3, 2002, in the record, Exhibit 6 at 300, 300A, and a Forest Service issuance, Exhibit 6 at 301, 301A, regarding the invasion of noxious weeds in the given forest, the record does not demonstrate either that the referenced weeds were other than reasonably anticipated vegetative growth to be removed or that the contractor was unaware of these issuances at the time it submitted its proposal.

In its subsequent brief (Feb. 28, 2006), the contractor identifies the nature of the differing site condition it claims existed:

Generally, the differing physical condition QF [the contractor] complains of consists of the number and/or nature of the seeds in the ground. This changed condition manifested itself as an unusual and unexpected growth of vegetation. QF does not purport to know how or why the number of seeds or the rate of germination caused so much vegetation to grow. Speculations as to previous wet and dry seasons may help answer the question of why, however, the analysis does not require an answer as to why so much vegetation grew no more than a contractor would have to explain what geologic process caused a layer of clay to exist unexpectedly at a construction site. QF will show through evidence of increased efforts, increased costs, previous experiences, and other evidence, that an unusual and unexpected amount of vegetation covered the work sites.

Contractor's Brief at 7. In this statement of the differing site condition, the contractor focuses upon the number and nature of the seeds in the ground. However, nothing in the record addresses either the number or nature of the seeds in the ground or any expectations relating thereto. The true concern to the contractor was the vegetation that needed to be grubbed at the time of performance. As determined above, the record does not demonstrate that the contractor was faced with unusual conditions. One cannot extrapolate from the existing record that the contractor's costs and efforts were increased by a condition that it should not have anticipated.

Finally, perhaps because the contractor seeks reimbursement for all of its costs incurred, the record does not show that the claimed "excess costs" were solely attributable to the allegedly materially different conditions. The contractor seeks to recover more than the original contract price for its alleged differing site condition. Even assuming additional vegetation, the record fails to demonstrate that the contractor's reasonable costs would grow

by such a factor. Without support, there is no basis to allocate or attribute costs to the alleged differing site condition. Thus, apart from its failure on entitlement, the contractor has failed to meet its burden of proof on the quantum aspect of its claim.

Added Work

The contractor pursues relief for the removal of grubbed material from the scalped radius around each tree. The contracting officer granted this aspect of the contractor's claim and issued a contract modification. The record does not demonstrate that the contractor is entitled to any additional money for the added work or that it remains unpaid under the contract modification. Finding 16. The Board denies this aspect of the claim.

Decision

The Board **DENIES** the appeal.

JOSEPH A. VERGILIO
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

HOWARD A. POLLACK
Board Judge