



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED: April 29, 2013

CBCA 2722

WEST BAY BUILDERS, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Timothy L. McInerney of McInerney & Dillon, Oakland, CA, counsel for Appellant.

Stephen R. Palmer, Office of the Regional Solicitor, Department of the Interior, Sacramento, CA, counsel for Respondent.

Before Board Judges **SOMERS**, **VERGILIO**, and **ZISCHKAU**.

SOMERS, Board Judge.

On December 19, 2009, West Bay Builders, Inc. (West Bay) and the United States Department of the Interior, Bureau of Reclamation (the Government) entered into a firm fixed-price contract for the construction of the Red Bluff Pumping Plant and Fish Screen Landfill Excavation & Canal, Siphon, and Access Bridge (the project). The contract required West Bay to construct a concrete siphon, identified as a large concrete structure consisting of slab-on-grade, walls, and a ceiling.

The specifications for this portion of the project described the types of joints that would be used in the concrete construction. Specification section 3.04, called "Joints and Edges," provided definitions for construction joints, contraction joints, control joints, and

expansion joints. Drawings referenced some of the specified joints. The standard drawings for cast-in-place concrete referenced a fifth type of joint, “optional construction joints.” The specification did not define “optional construction joints.”

On February 2, 2010, West Bay submitted a written request, identified as Request for Information (RFI) 001, for permission to omit the construction joints required by contract. Specifically, West Bay explained that the contract drawings showed construction joints at the intersection of the vertical walls and at the top of the siphon. Because the contractor planned to place the vertical walls and the top of the walls monolithically, West Bay asked the Government to “[p]lease advise if it is acceptable to omit the construction joints at the top of the siphon vertical walls.” The Government denied the request, stating that the construction joints were necessary “at the design locations due to the restrained cracking experienced in similar types of structures, particularly in the thick areas where walls/floors or wall/ceilings are cast together.”

Just over one year later, in March 2011, West Bay asked the Government to reconsider its previous response. West Bay proposed to “pour the Siphon walls and soffit monolithically.” It sought this change to accommodate the construction plan that West Bay had allegedly based its bid on. It noted that after the Government denied its first request, it

proceeded with using an alternate form system for Phase I (sic) of the Siphon. This alternate system was not as productive as we were hoping for, and as a result [West Bay] incurred substantially more costs [than] we had anticipated. . . . Therefore, in an effort to mitigate our losses, [West Bay] is requesting the [Government] reconsider your answer to RFI #1 and allow [the contractor] to pour the Siphon walls and soffit monolithically. This will save us both time and money.

The Government denied the request by letter dated April 11, 2011.

On April 14, 2011, West Bay wrote to the contracting officer, stating that “industry standards” indicate that the contractor should decide whether or not to include or eliminate construction joints. West Bay submitted a change proposal on July 14, 2011, seeking \$920,163 to compensate it for changes resulting from the Government’s refusal to allow it to eliminate the use of construction joints. West Bay converted the proposal to a certified claim on August 1, 2011. The contracting officer issued a final decision denying West Bay’s claim on October 28, 2011.

Discussion

Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 10-2 BCA ¶ 34,479. In resolving summary relief motions, a fact is considered to be material if it will affect our decision and an issue is genuine if enough evidence exists that the fact could reasonably be decided in favor of the nonmovant at a hearing. *Anderson*, 477 U.S. at 248; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). In considering summary relief, the tribunal will not make credibility determinations or weigh conflicting evidence. *Anderson*, 477 U.S. at 249; *accord JAVIS Automation & Engineering, Inc. v. Department of the Interior*, CBCA 938, 09-2 BCA ¶ 34,309, at 169,478.

In its motion, the Government contends that the contract specification, which provides that “[r]elocation, addition, or elimination of construction joints will be subject to approval by COR [contracting officer’s representative],” is clear and unambiguous. The Government says that if a contractor wishes to relocate, add, or eliminate construction joints, this change must be approved by the Government. The Government disagrees with West Bay’s assertion that the specifications permitted it to decide on its own whether to include or eliminate the required construction joints. To do so, argues the Government, would render the section requiring government approval to eliminate the construction joints meaningless. The Government asserts it acted in accordance with contract requirements when it denied West Bay’s request to eliminate a particular construction joint.

West Bay disagrees. Pointing to the specifications, West Bay contends that only construction joints require COR approval for relocation, addition, or elimination – control joints do not. West Bay notes that the drawings do not specifically reference construction or control joints. However, the drawings do provide details as to other joints, specifically, the contraction joints and expansion joints. In a declaration submitted by West Bay, the project manager states:

A portion of the Project involved the pouring (sic) a concrete slab-on-grade, vertical walls and a top (elevated deck) to complete the siphon. The joints as show[n] on the subject drawings for the intersection of the concrete wall and top of the siphon were designated simply as “CJ”. The drawing did not note any “optional construction joints.”

The project manager also noted that “[d]uring the course of the Project the Government allowed West Bay to omit Construction Joints in the concrete at the slab-on-grade and on the elevated decks running parallel with [the] direction of the siphon.” West Bay asserts that the drawings do not clearly distinguish between all of the possible types of joints and, in addition, the Government arguably has been inconsistent in its interpretation. Based upon those facts, West Bay concludes that the contract must be ambiguous.

Both parties rely upon excerpts from the deposition transcript of Katie Bartojay, a government engineer who prepared the specification at issue here. West Bay claims that section 3.04 makes no distinction between the terms “construction joints” and “control joints,” and notes that, in her deposition, Ms. Bartojay acknowledged not only that the terms were similar for the project, but also could give no example of where they would be different.

Meanwhile, the Government, also relying upon Ms. Bartojay’s deposition, states as follows:

Ms. Bartojay stated that control joints should be the same as construction joints. Deposition, p. 22, lines 21-22. Ms. Bartojay meant to compare control joints with contraction joints. See Deposition Errata Sheet attached as Exhibit 1 to declaration of Stephen R. Palmer. That Ms. Bartojay was comparing control joints with contraction joints is also clear from the context of the discussion during the deposition. Ms. Bartojay was referring to the specifications when she made the comparison to control joints. Ms. Bartojay stated in full: “In this – in our specification they should be – it states they should be the same as construction joints.” Deposition, p. 22, lines 21-22.

Thus, the Government concludes, the contract specification regarding the types of joints, as well as how they were denoted in the contract drawings, are clear and unambiguous.

As the contractor recognized in its initial RFI, the joints in question appear to have been required by the contract specifications. However, based upon the minimal record before us, we cannot determine whether the contract specifications, when examined together with the drawings, could be interpreted differently from the way in which they have been interpreted by the Government. The declarations and deposition transcript do not clarify the issue. We could draw some conclusions from the language and some of the dealings between the parties. But any such conclusions would require us to apply inferences and weigh various matters as to the reasonableness of West Bay’s interpretation in the context of the work involved.

It may be that once the record is more fully developed, we can determine that based upon the drawings, specifications, and testimony from relevant witnesses, West Bay's position cannot be supported. However, since this matter is before us on a motion for summary relief, at this point and with the record before us, we must make all inferences in favor of the non-moving party. Doing that, we cannot find in favor of the Government on summary relief at this time.

Decision

The Department of the Interior's motion for summary relief is **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

JONATHAN D. ZISCHKAU
Board Judge