UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: July 21, 2015

CBCA 4601

CHARLES BLALOCK AND SONS, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Philip E. Beck and Daniel J. Greenberg of Smith Currie & Hancock LLP, Atlanta, GA, counsel for Appellant.

Rayann L. Speakman, Office of the Chief Counsel, Federal Highway Administration, Department of Transportation, Vancouver, WA, counsel for Respondent.

SHERIDAN, Board Judge.

This dispute involves a contract between the Department of Transportation's Federal Highway Administration (FHWA) and Charles Blalock and Sons, Inc. (Blalock), to rehabilitate the Gatlinburg Bypass and Newfound Gap Road in the Great Smoky Mountains National Park in Tennessee. The contract included a number of line items, each with an estimated quantity and a unit price. After award, one of the line items was deleted and the contract price was consequently reduced. Blalock asserts that by eliminating the work, the FHWA improperly deprived it of the portion of its home office overhead that would have been absorbed by that line item. The amount in dispute is $23,708.37.

Blalock elected to have this appeal processed under the Board's expedited procedure for small claims. Rule 52 (48 CFR 6101.52 (2014)). This rule permits issuance of a decision in summary form. Decisions issued under the small claims procedure are final and conclusive and shall not be set aside except in cases of fraud affecting the Board's

proceedings. 41 U.S.C. § 7106(b) (2012); *Palmer v. Barram*, 184 F.3d 1373 (Fed. Cir. 1999). This decision has no value as precedent. The parties also elected to have the appeal processed under Board Rule 19, Submission on the Record Without a Hearing, and each submitted briefs and relevant documents which have been admitted into the record. 48 CFR 6101.19.

Background

The contract, which was awarded in August 2013, specified that it was "for the quantities of work actually performed at the unit prices as bid in the Bid Schedule." One of the line items, A0910, was described as "hot asphalt concrete pavement, Marshall test, class A, grading E, wedge or leveling course." The estimated quantity for this item was 2900 tons. In the bid schedule, Blalock bid this item at $140 per ton, for a total amount of $406,000.

Shortly after award, the FHWA determined that none of the line item A0910 work was necessary. The parties later executed a contract modification which, among other things, provided that this work was deleted and the contract price was reduced. Blalock claims that the reduction was excessive.

The parties disagree as to which contract clause should be applied to determine the reduction in contract price as a consequence of the elimination of line item A0910. Blalock points to the Variation in Estimated Quantity (VEQ) clause, Federal Acquisition Regulation (FAR) 52.211-18, which provides, in pertinent part:

> If the quantity of a unit-priced item in this contract is an estimated quantity and the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity, an equitable adjustment in the contract price shall be made upon demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity.

48 CFR 52.211-18 (2012).

FHWA believes that the applicable contract clause is section 109.07 of the Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects, which is entitled "Eliminated Work." This clause states:

> Follow the requirements of FAR Clause 52.243-4 Changes.[1]
>
> Work may be eliminated from the contract without invalidating the contract. The Contractor is entitled to compensation for all direct costs incurred before the date of elimination of work plus profit and overhead on the direct incurred costs. Anticipated profit and overhead expense on the eliminated work will not be compensated.

Discussion

Resolving this dispute calls for us to follow basic rules of contract interpretation:

> When interpreting the contract, the document must be considered as a whole and interpreted so as to harmonize and give reasonable meaning to all of its parts. *McAbee Constr., Inc. v. United States*, 97 F.3d 1431, 1434–35 (Fed. Cir.1996). An interpretation that gives meaning to all parts of the contract is to be preferred over one that leaves a portion of the contract useless, inexplicable, void, or superfluous. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991).

NVT Technologies, Inc. v. United States, 370 F.3d 1153, 1159 (Fed. Cir. 2004). We must consequently give meaning to both the VEQ clause and section 109.07 of the Standard Specifications.

As Blalock points out, the VEQ clause speaks in terms of "costs"; it does not limit those costs to direct costs. The object of including this clause in a contract "is to retain a fair price for the contract as a whole in the face of unexpectedly large variations from the estimated quantities on which bids are based." *Brink's/Hermes Joint Venture v. Department of State*, CBCA 1188, 09-2 BCA ¶ 34,209, at 169,116 (quoting *Burnett Construction Co. v. United States*, 26 Cl. Ct. 296, 303 (1992)). When the Government orders only a small fraction of an estimated quantity, the indirect overhead costs which the contractor allocated to the entire quantity disproportionately shift to the quantity ordered. "There is no reason

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[1] This clause permits the contracting officer to "make changes in the work within the general scope of the contract." 48 CFR 52.243-4(a). It provides further, "If any change under this clause causes an increase or decrease in the Contractor's cost of . . . the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing." *Id*. (d).

why the costs recoverable should not include overhead which would have been absorbed had the estimated quantities been ordered, but were left unabsorbed by the order shortfall. These costs are real." *Id*. at 169,117 (quoting *Natco Limited Partnership*, ENG BCA 6183, 96-1 BCA ¶ 28,062, at 140,132 (1995) (quoting *Henry Angelo & Co.*, ASBCA 43699, 94-1 BCA ¶ 26,484, at 139,824 (1993)).

If we were to follow this general understanding, we would grant Blalock recovery of home office overhead costs which would have been absorbed if the entire quantity of line item A0910 had been ordered. We cannot do this, however, because to do so would be to read section 109.07 of the Standard Specifications out of the contract. Harmonizing and giving reasonable meaning to both the VEQ clause and section 109.07, we view the latter section as placing limits on recovery under the former clause. Under section 109.07, the Changes clause – under which recovery is similar to what is prescribed by the VEQ clause – is to be followed. However, "[a]nticipated profit and overhead expense on the eliminated work will not be compensated." Consequently, Blalock may not recover the anticipated overhead expense it seeks.

Decision

The appeal is **DENIED**.

PATRICIA J. SHERIDAN
Board Judge