



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED: February 18, 2016

CBCA 4779

TUCCI AND SONS, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

J. Craig Rusk and Alix K. Town of Oles Morrison Rinker & Baker, LLP, Seattle, WA, counsel for Appellant.

Rayann L. Speakman, Western Federal Lands Division Counsel, Federal Highway Administration, Department of Transportation, Vancouver, WA, counsel for Respondent.

Before Board Judges **POLLACK**, **SHERIDAN**, and **LESTER**.

SHERIDAN, Board Judge.

Respondent, the Department of Transportation (DOT), filed a motion for summary relief arguing that an alleged differing site condition did not damage appellant, Tucci and Sons, Inc. (Tucci), because appellant's actual costs on the contract were less than its bid amount or its anticipated costs. Appellant asserts respondent's position is "fundamentally flawed . . . as it . . . misapplies the appropriate standard of measuring damages." We agree with appellant and deny respondent's motion for summary relief.

Background

On December 30, 2013, DOT's Federal Highway Administration (FHWA), Western Federal Lands Highway Division (WFLHD), entered into a construction contract with Tucci to reconstruct a 9.7-mile portion of highway and install utility conduits for a 6.06-mile length

road in Mount Rainier National Park. The contract included 32,000 linear feet of item A2380, “utility trench,” and 300 linear feet of item A2360, “utility trench, concrete fill.” Tucci’s bid price for item A2380 was \$43.25 per linear foot, and its bid price for A2360 fill was an additional \$37 per linear foot.

The contract included the clause found at Federal Acquisition Regulation (FAR) 52.236-2, “Differing Site Conditions,” which provides:

(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.

48 CFR 52.236-2(a), (b) (2013) (emphasis added).

When Tucci began to work on the utility trench on March 13, 2014, it encountered what it considered a differing site condition and notified the FHWA contracting officer. Specifically, Tucci alleged that while attempting to excavate the utility trench, it encountered “numerous large boulders . . . which drastically slow and potentially inhibit the installation of the proposed utilities on the project. The unusual size and concentration of the obstructions [were] unanticipated at the time of the bid.” The FHWA disputed the existence of a differing site condition.

On March 25, 2014, Tucci added a second crew to work on the utility trench. The utility trench was completed on May 6, 2014. Tucci requested an equitable adjustment totaling \$81,320.45 for what it considered to be the extra work associated with the unanticipated boulders. FHWA rejected the request. On December 2, 2014, Tucci requested a final decision. Concluding that the situation Tucci encountered did not constitute a differing site condition, the contracting officer denied the claim on April 16, 2015. Tucci appealed the contracting officer’s decision to this Board, where the matter was docketed as CBCA 4779.

During discovery in this matter, when asked to identify its anticipated unit cost for utility trench work, Tucci indicated that its anticipated costs were \$40.42 per linear foot for item A2380 and \$74.85 per linear foot for item A2360. Tucci also responded in discovery that “[t]he actual cost to construct all the utility trenches was \$38.52 per linear foot.”

On November 20, 2015, FHWA filed a motion for summary relief, asking the Board to dismiss the appeal. FHWA argued that even if a differing site condition was encountered, Tucci is not entitled to recover because it has failed to demonstrate that it experienced an increase in its contract costs due to the alleged differing site condition. FHWA asserted that in order to prevail on a differing site condition claim, Tucci must show that “it experienced an increase in cost due to the physical conditions of the site,” and that Tucci’s actual costs were less than either its bid amount or its anticipated cost for the utility trench work.

Tucci responded that the appropriate way to measure differing site damages is the additional costs incurred due to the differing site condition, not whether the project was still profitable despite encountering a differing site condition. Tucci maintained that it is entitled to recover the additional costs directly attributable to the differing site condition regardless of whether those costs increased the originally estimated (or anticipated) costs of the project. As an attachment to its response to the motion, Tucci provided the declaration of Mr. O. Dan Nelson, its project manager and estimator. Pertinent to this motion, Mr. Nelson declared:

Tucci . . . tracked the cost of [the extra] work [associated with encountering boulders] on a daily basis. The on-site foreman recorded the start and stop time of the efforts to remove the boulders, using a separate cost code. These daily reports were presented to the Government during the course of work on a daily basis.

In most instances once a boulder was encountered, we would have to move equipment that was participating in the excavation and bring in the equipment that could break up the rock. Once it was broken up, we would then have to remove it and haul it away so that we could continue with our excavation. Alternatively, we would need to over-excavate the trench to remove the boulder, haul the rock away, and bring in additional material to fill the holes that were left to restore the roadbed to the contract specifications. These efforts take additional time and increase equipment costs I did not include in the bid.

This time was tracked and what the Tucci . . . claim seeks is the costs associated with this time. That would be labor and the equipment costs. These

costs were submitted to the Government in the Request for Equitable Adjustment and subsequent Claim that was submitted in this matter.

For the labor, we have included the base pay together with the benefits taxes and other normal payroll associated costs.

For the equipment, we used the established rental rates as set for in [the] Rule 4 [appeal file], [exhibits] 67 and 68. These equipment rates have been routinely used in pricing change orders and extra work and have been agreed to by the Government in Tucci's submittal 34 (Rule 4, [exhibit] 72 at 50-53).

We have tracked these costs separately as they are costs we would not have incurred, but for the fact we encountered the unanticipated boulders. Our overall costs would have been lower by the amount that we have set forth in our claim, if we had not encountered the boulders.

Discussion

This appeal arises from FHWA's denial of a claim for extra costs Tucci asserts it incurred when it encountered a differing site condition while performing the contract. Bypassing the issue of whether Tucci encountered a differing site condition,¹ FHWA moves for summary relief arguing that even if a differing site condition was encountered, appellant is not entitled to recover because it has failed to demonstrate that it experienced an increase in its total contract costs due to the alleged differing site condition. More specifically, respondent argues that to prevail on a differing site condition claim, a contractor must show that "it experienced an increase in cost due to the physical conditions of the site," and that Tucci's actual costs were less than either its bid amount or its anticipated cost for the utility trench work.

In opposition, Tucci maintains that FHWA's position is contrary to law and logic. Appellant posits that the appropriate way to measure damages is the additional costs incurred due to the differing site condition, not whether the project was still profitable despite

¹ To qualify for an equitable adjustment based on the Differing Site Conditions clause, the contractor must prove the existence of one of two categories of compensable conditions: category I (site conditions which differ materially from those indicated in the contract) or category II (conditions which are unknown and unusual and differ materially from those generally encountered in the type of work being procured). *E.g., Imbus Roofing Co.*, GSCA 10430, 91-2 BCA ¶ 23,820, at 119,348.

encountering the condition. Tucci maintains that it is entitled to recover the additional costs directly attributable to the differing site condition regardless of whether those costs increased the originally estimated (or anticipated) costs of the project. Moreover, appellant asserts that its ability to perform for less than its bid price for the project and obtain a profit is not a basis to deny it the right to claim compensation for damages associated with the differing site condition.

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 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A fact is considered to be material if it will affect the Board's decision, and an issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the nonmovant after a hearing. *V.I.C. Enterprises, Inc. v. Department of Veterans Affairs*, CBCA 1598, 09-2 BCA ¶ 34,284, at 169,363; *Charles Engineering Co. v. Department of Veterans Affairs*, CBCA 582, et al., 08-2 BCA ¶ 33,975, at 168,055-56.

The appropriate measure of damages for a differing site condition is the additional cost incurred by the contractor as a result of the differing site condition. More specifically, the equitable adjustment for a differing site condition is "the difference between what it cost it to do the work and what it would have cost if the unforeseen conditions had not been encountered." *Roscoe-Ajax Construction Co. v. United States*, 458 F.2d 55, 60 (Ct. Cl. 1972); see also *P.J. Dick Inc. v. General Services Administration*, GSBCA 12036, et al., 94-3 BCA ¶ 27,073; *Cherry Hill Construction, Inc. v. General Services Administration*, GSBCA 12087(11217)-REIN, 93-2 BCA ¶ 25,810.

In determining the amount of an equitable adjustment under the Differing Site Conditions clause, the basis should not be the bid estimate. *Air-A-Plane Corp.*, ASBCA 3842, 60-1 BCA ¶ 2547. The object of pricing an equitable adjustment "is to maintain insofar as practicable the cost/profit relationship existing at the time of the change. Equitable adjustments may not be used as a device for repricing or reforming the bargain the parties originally made." *American Electric, Inc.*, ASBCA 15152, 73-1 BCA ¶ 9787, at 45,735 (1972).

The FHWA's view that the claim should be denied because no costs were incurred in excess of the amount Tucci estimated or anticipated incurring is not the proper standard to apply in determining what, if any, damages Tucci has incurred. Tucci is entitled to recover the difference between what it cost to perform the purported extra work associated with the

trenching and what it would have cost to perform the work contemplated by the contract. Accordingly, we deny respondent's motion.

In reviewing the record for this decision we make some preliminary observations regarding quantum. The method Tucci appears to have used to prove quantum does not appear to lend itself to anything other than an "all or nothing" determination, giving the Board little way to parse the differing material removed if it determines that some, but not all, of the material removed constituted the differing site condition. Further, the record does not appear to lend itself to a determination of the difference between what the trenching "would have cost" and what it "did cost." While we recognize that proof of damages is not an exact science, in the event we find some entitlement, there must be some basis in the record for making a fair and reasonable approximation of the dollar adjustment to be made. *Essex Electro Engineers, Inc.*, ASBCA 21066, 79-2 BCA ¶ 14,035 at 68,952 ("Damages need not be proven with absolute certainty or mathematical certitude. It is sufficient if a reasonable basis for computation is furnished provided liability, causation and injury are established."); *Henry Products Co.*, ASBCA 16128, 73-2 BCA ¶ 10,348, at 48,879.

Tucci bears the burden of proving that it encountered a differing site condition, that the differing site condition caused an increase in the cost of performance of its work, and the amount of that increase. *Quality Forests, Inc. v. Department of Agriculture*, CBCA 123, 07-1 BCA ¶ 33,490. Mr. Nelson declares that but for the differing material in the form of boulders that Tucci encountered, the utility trench work would have cost Tucci \$81,320.45 less than it ended up costing Tucci. While Mr. Nelson's conclusions are not compelling proof of what it would have cost Tucci to perform the work in the absence of the alleged differing site condition, we will allow Tucci the opportunity to clarify and present further evidence to prove its claim. To prove its damages, Tucci must produce evidence establishing what it would have cost Tucci in the absence of the alleged differing site condition versus what it cost Tucci to do the trenching work when the alleged differing site condition was encountered. While the amounts Tucci bid may not be useful in measuring quantum, this information may be relevant to the issue of entitlement, by identifying the type of materials Tucci planned on encountering in the utility trenches it was required to dig. Further, even though an increase in the anticipated total project costs is not usually a dispositive consideration in determining damages for an alleged differing site condition, the total anticipated cost for the trenching work may, again, be relevant to the issue of entitlement.

In the event the Board finds that some, but not all, of the material Tucci encountered constituted a differing site condition that increased Tucci's cost of performance, it will need sufficient evidence in the record to be able to quantify the amount of that increase. At this point, Tucci asserts that it can prove it incurred \$81,320.45 in extra costs that it would not have incurred had it not encountered unanticipated differing material in the form of boulders.

The record thus far does not make clear how Tucci tracked the work to derive the amount it claims, but we leave that for further explanation at hearing.

Our discussion regarding our concerns as to how quantum is presented should not be taken as a finding of entitlement. Respondent has not conceded entitlement and we have made no findings as to entitlement.

Decision

Respondent's motion for summary relief is **DENIED**.

PATRICIA J. SHERIDAN
Board Judge

We concur:

HOWARD A. POLLACK
Board Judge

HAROLD D. LESTER, JR.
Board Judge