



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

July 11, 2017

CBCA 5377-FEMA

In the Matter of ORLEANS PARISH SHERIFF'S OFFICE

Michael G. Gaffney of Gaffney & Gaffney, Metairie, LA, counsel for Applicant.

Mark S. Riley, Deputy Director, Lynn Browning, Assistant Deputy Director - Public Assistance, and Carla Richard, Appeals Manager, Governor's Office of Homeland Security and Emergency Preparedness, Baton Rouge, LA, appearing for Grantee.

Charles Schexnaildre and Frank Bruscato, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Baton Rouge, LA; and Brock J. Pierson, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Federal Emergency Management Agency

Before the Arbitration Panel consisting of Board Judges **GOODMAN**, **ZISCHKAU**, and **O'ROURKE**.

Pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5207 (2012), when the President declares that a natural disaster exists, the Federal Emergency Management Agency (FEMA) may provide various types of assistance in the affected area. Among these varieties of help are public assistance grants to states, local governments, and certain non-profit organizations for the repair, restoration, and replacement of damaged facilities. *Id.* § 5172; 44 CFR 206.200 et seq (2006).

The applicant, Orleans Parish Sheriff's Office (applicant), has asked this Board to arbitrate a dispute with FEMA. The case is before us under authority of section 601 of Public Law 111-5, the American Recovery and Reinvestment Act of 2009, and section 206.209 of title 44 of the Code of Federal Regulations.

The record in this appeal consists of the applicant's request for arbitration dated June 24, 2016 with exhibits, the applicant's protective request for arbitration dated July 21, 2016, the grantee's recommendation, FEMA's response, a revised request for arbitration with exhibits, and witness lists and witness statements. A hearing was held in Washington, D.C., on March 28-29, 2017. The parties agreed at the close of the hearing that if the arbitration panel finds that one or both of the change orders at issue are eligible for reimbursement by FEMA, the actual costs to be paid will be determined by the parties without further intervention of the arbitration panel.

Background

The Templeman detention facility (facility) in New Orleans, Louisiana was constructed in 1992. The facility consisted of Templeman III, a four-story structure; Templeman IV, a one-story structure; and a gymnasium. On August 29, 2005, Hurricane Katrina struck the Gulf Coast and the President of the United States declared Hurricane Katrina a major disaster in Alabama, Louisiana, and Mississippi. High winds and storm surge from Hurricane Katrina flooded the facility to approximately five feet for an extended period of time, damaging equipment and finishes.

On April 7, 2006, FEMA obligated project worksheet (PW) 4876 version 0 for repair work necessary to return Templeman III and IV to pre-disaster condition. On January 28, 2008, FEMA determined Templeman III and IV were eligible for replacement in version 3 of PW 4876.

The project was designed by Sizeler Thompson Brown/Grace Hebert Joint Venture, which compiled the contract documents, which included the AIA (American Institute of Architects) Construction Contract Form A101-2007, General Conditions Form A201-2007, technical specifications, and drawings.

The General Conditions contained the following provision:

§ 3.7.4 Concealed or Unknown Conditions. Contractor represents that it has investigated the site and is familiar with all known, apparent, or reasonably discoverable conditions, subsurface or otherwise, which will be encountered at the site, and that Contractor has taken those conditions into account in establishing the Contract Sum and the Contract Time, as well as all other conditions concerning the performance of the Work, including without limitation, underground and above ground utilities, work space restrictions, work hour restrictions, noise restrictions, restrictions on site ingress and egress, security restrictions, weather conditions, ground water, dewatering requirements, temporary and permanent utilities relocation, ventilation requirements, and all other restrictions, demands, and requirements needed for

the timely and adequate performance of the Work required by the Contract Documents, and all such conditions have been assumed by Contractor and [are] reflected and incorporated into the Contract Sum and the Contract Time, Subject to the foregoing, if the Contractor encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then the Contractor shall promptly provide notice to the Owner, the Architect and Project Manager before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if the Architect determines that they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall promptly notify the Owner and Contractor in writing, stating the reasons. If either party disputes the Architect's determination or recommendation, that party may proceed as provided in Article 15.

The information sent to bidders included a geotechnical engineering report dated May 7, 2010, prepared by Professional Service Industries. According to the applicant, the report did not provide information regarding unforeseen site conditions nor did it attempt to shift responsibility for unforeseen site conditions to the contractor that would be awarded the construction contract.

The applicant solicited bids and later selected McDonnell Group, LLC and Archer Western Contractors LTD Joint Venture (McDonnell/Archer Western or contractor) as the contractor to perform the eligible work. The applicant awarded a firm-fixed-price contract on July 28, 2011, and work began in August 2011.

Change order 5 was executed on January 3, 2013, between the applicant and the contractor. The transmittal letter from the construction manager to the applicant dated January 16, 2013, described the scope of the change order as follows:

The scope of this Change Order includes removal of unforeseen cypress stumps and root masses unearthed on the south side of the site that interfered with the new building piles. The stumps were first discovered on November 14, 2011 during initial excavation in preparation for pile driving.

These obstructions were removed . . . ; consequently the costs included in this change order are the actual costs as incurred on the site. These costs were monitored closely on site and the work activities were documented by the contractor's and [project manager]'s daily observation reports.

The time required to remove the obstructions and backfill the excavations caused delays to the pile driving critical path activity. This change order includes a time extension of 17 days to the contract duration. It was determined that 6 days of the extension should be compensable delays, including general conditions costs. . . . All general conditions costs were reviewed thoroughly by the architect and [project manager] as submitted by the contractor.

The total cost of this Change Order is \$221,199.00, including general conditions costs for compensable days. All costs have been reviewed by the architects and [project manager] and are recommended for approval.

Change order 7 was executed on January 16, 2013, between the applicant and the contractor. The transmittal letter from the construction manager to the applicant described the scope of the change order as follows:

The scope of this Change Order includes removal of an unknown underground wooden drainage structure unearthed at the south side of the site early in construction. The unforeseen structure had to be removed in order to continue installation of the new concrete piles and foundations.

The time required to expose, remove the structure and backfill the excavations caused delays to the new pile driving critical path activity. Additionally, a heavy oil-like sludge was found inside of the structure which had to be tested to determine if it contained hazardous materials. The material was determined to be safe for disposal. This change order includes a time extension of 14 days to the contract duration. It was determined that 10.5 days of the extension should be compensable days, including general conditions costs.

The total cost of this Change Order is \$289,708.00, including general conditions costs for compensable days. As noted, the work was directed . . . and represents the actual cost of the work completed. The attached documentation outlines personnel, materials, equipment and general conditions costs associated with the work. All costs have been reviewed by the architects and [the project manager] and are recommended for approval.

In May 2016, FEMA denied the applicant's claim for reimbursement for change orders 5 and 7. In June 2016 the applicant filed its request for arbitration, and the next month filed its protective request for arbitration. According to FEMA, "[a] plain language reading of [the applicant's] contract with McDonnell/Archer Western clearly shows that these items were contemplated within the four corners of the contract and a part of the accepted bid costs." FEMA Response to Request for Arbitration at 9. FEMA further explains its position as follows:

[T]he requests made by [the applicant] in their RFA [Request for Adjustment] should be denied for multiple reasons. First, [the applicant]'s contract language clearly addressed stump removal and underground structure removal as inclusive of the firm fixed price contract specifications and bid costs, thus, the contractor, and not [the applicant] or FEMA is responsible for the cost overruns based on a four corners interpretation of the contract. Further, the underground structure excavation costs claimed are unequivocally not concealed or unknown conditions as claimed by [the applicant]. Second, assuming arguendo the work requested by [the applicant] was not specifically identified as work required by the contract, the costs cannot be validated based on lack of documentation and are unreasonable, and therefore ineligible, in accordance with 2 C.F.R. § 225 Appendix A (C)(1)(a), 44 C.F.R. § 206.204(e)(2) and FEMA policy. The delay and standby costs requested under Change Order 5 and Change Order 7 are unsubstantiated by the facts. Further, [applicant] failed to abide by contract requirements and failed to produce adequate supporting documentation for this work. Additional [applicant] failures included: failure to include critical path elements in the schedule, failure to adhere to the schedule, failure to acknowledge the excavation was behind schedule, and failure to acknowledge the pile driving contractor was not prepared to complete the work and/or could and did complete work elsewhere. Notably, the contractors themselves dispute the cause of any delay realized. . . . Therefore, FEMA requests that the Board deny all other funding to [the applicant] under the Public Assistance Program for these disputed costs and find in favor of FEMA.

Id. at 2-3.

Pertinent sections of the contract addressing excavation of stumps and underground structures during construction are:

1. Contract Specification 02200, Section 3.3A—Excavation is unclassified and includes excavation to subgrade elevations indicated, regardless of character of materials and obstructions encountered.

2. Specification 02200, Section 3.3A1—Include removal of pavements and other subsurface obstructions, underground structures, utilities, and other items which are encountered, unless such items are indicated to remain.
3. Specification 02100, Section 3.3A—Remove obstructions, trees, shrubs, grass, and other vegetation to permit installation of new construction. Removal includes digging out stumps and obstructions and grubbing roots.
4. Specification 02230 Section 3.5A3—Grind stumps and remove roots, obstructions, and debris extending to a depth of 18 inches below exposed sub grade.

According to FEMA, “[t]he above contract language is clear and unambiguous that the physical conditions encountered at the site during routine construction work (stump and underground structure removal) were well within the scope of work for which the contractors were responsible.” FEMA Response to Request for Arbitration at 13.

The applicant believes that FEMA’s determination that the work performed and delays incurred as the result of the two change orders was within the scope of the contract is incorrect. The applicant states:

Five years later, after the entire construction project is complete and the Contractor has been paid, while preparing Version 8 of the Project Worksheet 4876, FEMA is second guessing the collective judgment of all the licensed professionals. FEMA has determined that under its interpretation of two of the Technical Specifications of the Contract Documents, the removal of these obstacles and foreseen conditions is included within the Contractor’s scope of Work. Thus, FEMA determined that under its interpretation of the Technical Specifications, the Contractor undertook the risk of removing any unforeseen obstructions at the site and is not entitled to additional compensation.

Request for Arbitration at 8.

Discussion

This case concerns two change orders approved by the applicant and paid to the contractor for which the applicant seeks reimbursement from FEMA. FEMA believes that the work performed and paid for pursuant to both change orders was within the scope of the fixed-price contract and therefore not reimbursable.

Sheriff Marlin Gusman, representing the applicant, testified that while the applicant had prior knowledge of subsurface wooden pilings, there was no prior indication that there

were large buried stumps or wooden drainage structures, the subject of the change orders at issue.

The applicant offered testimony from Gerald D. Hebert II, the architect who prepared the General Conditions to the contract, including standard AIA provisions and language specific to the work to be performed. He offered factual testimony as to his preparation of the contract general conditions and his continuous administration of the contract, and opinion testimony based upon his expertise as an architect. Mr. Hebert testified it was not his intent when he drafted the general conditions and specifications that the concealed conditions clause would be negated by the specifications dealing with excavation. He stated that as the architect, he had the obligation to interpret the contract documents during contract performance and determine if the conditions encountered were concealed conditions within the meaning of the concealed conditions clause, and he determined that they were. In making his determination, he believed that he did what was required pursuant to the clause—after the contractor gave notice, he promptly investigated the conditions and recommended to the owner that an equitable adjustment be made to the contract price and time.

Mr. Hebert testified that he determined that the stumps and underground wooden drainage structure were concealed conditions pursuant to the concealed or unknown conditions clause and he and his associate, Raymond Jody Gascon, negotiated with the contractor for more than a year and worked through seven versions of the change orders before finalizing the costs of the work and the length of the compensable delays, based upon the need to resequence the work, including pile driving, on the critical path. Mr. Hebert and Mr. Gascon used their factual knowledge of the project progress, expertise, and judgment to determine the delays as the result of the conditions encountered. Mr. Hebert emphasized that while he believed the conditions encountered were concealed conditions, the difficulty was the assessment of the delay.

Mr. Hebert testified credibly, factually, and competently as to his analysis of the “reality” of the situation which in his determination caused the contractor to change the sequence of the work when the two stumps were encountered and delayed performance, thereby causing a compensable delay which he approved in change order 5. He testified: “The problem wasn’t removal of the stump. The problem was the delay in the critical path.” Transcript at 85. “I deal in reality. And the reality is the pile rigs were on site at the time this was going on. They were sitting on site. And the reality is there was a delay in the digging process which was a critical path item. . . . And that’s the reality of the situation and the way we looked at it.” *Id.* at 88. “What I know is that we hit an item that was an unforeseen condition and we examined the delay from that point that we thought was fair and equitable.” *Id.* at 95.

On cross-examination, Mr. Hebert reaffirmed his extensive fact finding and his analysis. He testified that he made what he believed to be a fair and equitable determination

of delay in both change orders. Mr. Gascon testified in detail concerning the extensive negotiations that resulted in the determination of the time, both compensable and non-compensable, and costs that were allowed pursuant to the change orders.

Garry Gallien, who worked for Ozone Construction Company, the project manager, concurred in the determination that the conditions encountered were concealed conditions within the purview of the concealed conditions clause. He described the logic of the contractor's alteration of the planned schedule as a result of encountering the conditions.

FEMA presented opinion testimony of three witnesses—Christopher Gregus, FEMA lead project specialist; Donald Hallett, Jr., an employee of AECOM, a technical assistance contractor to FEMA; and John Connolly, a FEMA employee. In summary, these witnesses testified that they believed the conditions encountered were not within the concealed conditions clause, but encompassed within the scope of work of the fixed-price contract. In so doing, they offered their own interpretation of the contract provisions quoted in the excerpt from FEMA's response with regard to excavation, contrasting this interpretation with their understanding of the scope of the concealed conditions clause. They further testified that, based upon their examination of documents, in their opinion the conditions encountered that gave rise to both change orders did not result in a delay to the critical path of the project, and any delays encountered were the result of poor scheduling on the part of the contractor. None of these witnesses had personal, contemporaneous knowledge of the alleged concealed conditions, the actions of the contractor to deal with these conditions, and the deliberations of the architect and his assistant in investigating the conditions and determining what they believed to be the resulting compensable and non-compensable delays.¹

We find the testimony of the FEMA witnesses unpersuasive. Interpretation of contract provisions is a legal issue, and therefore opinions of purported experts as to contract interpretation is not appropriate expert testimony. Rather, such opinions are treated as part of the briefing and argument of the party offering the testimony. *Akal Security, Inc. v. Department of Homeland Security*, CBCA 3389 et al., 17-1 BCA ¶ 36,580 (2016) (citing *Rumsfeld v. United Technologies Corp.*, 315 F.3d 1361, 1369 (Fed. Cir. 2003)).

In addition to offering opinion as to legal issues, the FEMA witnesses' opinions that the architect should have reached a different determination as to the existence of the

¹ Mr. Gregus testified about his interpretation of the contract provisions. Transcript at 325. He was not at the project site during performance. *Id.* at 353. Mr. Hallett testified at length concerning his belief that the schedule was defective and the number of existing piles on the project site were not considered by the contractor in planning its work. *Id.* at 410-21; 425, 430. Mr. Connolly also opined that no compensable delay occurred. *Id.* at 504. These allegations were sufficiently rebutted by Mr. Hebert. *Id.* at 515; 535-36; 549; 551.

concealed conditions and the resulting delay lack a factual foundation, as the FEMA witnesses were not aware of the factual basis for the architect's determination as to the existence of the concealed conditions or the extensive negotiations with regard to the delays. The assertions of the FEMA witnesses as to the contractor's "bad scheduling" and lack of delay to the critical path are not supported. Thus, the FEMA witnesses, while opining as to what they believed should have been the thought processes of the architect and contractor, did not have personal knowledge of the factual circumstances on the project site or the thought processes of the architect or the contractor. The testimony of the FEMA witnesses does not discredit the testimony of the architect, his assistant, and the project manager, nor render the testimony of these witnesses inherently improbable. Based on the record, we find that the testimony of the applicant's witnesses prevails over that of the FEMA witnesses. *See, e.g., Drennon Construction & Consulting, Inc. v. Department of the Interior*, CBCA 2391, 13 BCA ¶ 35,213; *State of Louisiana, Facility Planning & Control*, CBCA 1741-FEMA, 10-1 BCA ¶ 34,441.

Decision

The architect had the authority under the construction contract to determine the existence of concealed conditions and to negotiate the resulting delays with the contractor. His determination with regard to change orders 5 and 7 that concealed conditions did exist and his negotiation of the associated compensable and non-compensable delays were supported by his expertise, extensive investigation, and fact-finding. The applicant has proved the occurrence of the alleged delay associated with the work. Accordingly, the work performed pursuant to change orders 5 and 7 and the compensable delays determined therein are eligible for reimbursement by FEMA. As the parties agreed at the close of the hearing, the actual costs to be paid will be determined by the parties without further intervention of the arbitration panel.

ALLAN H. GOODMAN
Board Judge

JONATHAN D. ZISCHKAU
Board Judge

KATHLEEN J. O'ROURKE
Board Judge