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| A-LINE CONSTRUCTION, INC., |) | AGBCA No. 2000-130-2 |
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| Appellant |) | |
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| Representing the Appellant: |) | |
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DECISION OF THE BOARD OF CONTRACT APPEALS

June 18, 2001

OPINION BY ADMINISTRATIVE JUDGE JOSEPH A. VERGILIO

A-Line Construction, Inc. (contractor) of Los Angeles, California, filed this appeal with the Board on February 10, 2000. The respondent is the U. S. Department of Agriculture, Forest Service (Government). The dispute involves a contract, No. 43-9A14-9-7035, which required the installation of a slope protection system over a washout area of a road (City Creek Road #1N09, ERFO (Emergency Relief Federally-Owned, 23 U.S.C. § 125) repair site two) in the San Bernardino National Forest in California.

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. On March 1, 2000, the contractor elected the small claims (expedited) procedures, such that this is a decision by one judge, which is final and conclusive and shall not be set aside (except in cases of fraud). The decision shall have no value as precedent (outside of resolving this dispute). 41 U.S.C. § 608; Rule 12. Throughout the proceedings, the contractor has been dilatory in providing information, at times requesting extensions, at times simply missing deadlines, thereby making it impossible to meet the statutory goal of resolving a small claim appeal within 120 days of the election.

The parties have submitted the case pursuant to Rule 11, without a hearing. Neither party submitted a brief after the evidentiary record closed.

The contractor's claim fails for lack of proof. Through its total cost approach (seeking to recover the difference between what it characterizes as its actual costs to complete and the modified contract price), the contractor has not presented sufficient evidence. The record demonstrates neither that the contractor worked on a slope which was steeper than it anticipated at the time of award nor that work on the steeper slopes resulted in the contractor incurring additional hours and expenses. Moreover, although the contractor seeks compensation for what it describes as additional efforts due to differing site conditions or changes, the dates or times of such efforts are not indicated or supported in the record. Having developed such an insufficient record, the contractor does not prevail.

Accordingly, the Board denies this appeal.

FINDINGS OF FACT

The contract

1. After suggesting to the Government that an articulating concrete block system might provide a suitable fix for the area in question (Exhibit 6 at 377-79) (all exhibits are in the appeal file), A-Line responded to a Government-issued request for quotations (RFQ) (Exhibit 6 at 286-87). With an acceptance by A-Line on May 27, 1999, the parties entered a contract, in accordance with the terms and conditions of the modified RFQ, for \$93,760.50. The contract price is comprised of three line items: mobilization (at a fixed lump sum), excavation, backfill and compaction for structure (at a fixed lump sum) and installation of the slope protection and erosion control system (priced by the square yard on the estimated yardage). The contract, No. 43-9A14-9-7035, requires the contractor to install approximately 1900 square yards of an articulating concrete block slope protection system (4-inch fabric formed concrete) over a washout area to be regraded and shaped by the Government. (Exhibit 6 at 268, 287.) The manufacturer is to design and certify cable sizing (Exhibit 6 at 285 (¶ 14.B), 290 (¶ 1010-1.01)). The time for performance is stated as 21 calendar days (Exhibit 6 at 285 (¶ 14.C)).

2. The contract contains a general elevation map of the area. The map specifies that regrading and shaping of the existing channel washout and roadbed area is to occur. (Exhibit 6 at 262.) The contract does not specify what slopes are to be attained as a result of the regrading and shaping. The contractor viewed the site in November 1998 and May 1999, such that the existing conditions and potentials for regrading were or should have been observed (Exhibit 6 at 350).

3. Regarding the preparation of the ground upon which the slope protection system is to rest, the contract specifies:

The Forest Service will be completing the initial fill slope and roadway area restoration work prior to contract award. Additional contract work will include the

designated recompaction of the fill slopes, native earth berms and portions of the existing roadbed area upon which the slope protection material is being placed. Included in the work will be the designated trenching/cut-off wall construction around the entire outer perimeter of the Articulating Concrete Block System being installed.

(Exhibit 6 at 288 (¶ C.1.1).)

4. The contract details the contractor's obligations for excavation, backfill and compaction:

This work consists of recompaction of the existing native fill slopes, designated portions of the existing roadbed and earth berms (currently being reconstructed by the government) including the construction of varying depth cut-off wall trenches upon which the articulating block system will be placed.

(Exhibit 6 at 300 (¶ 2220-1.01)). This description of the contractor's work and that found elsewhere in the contract (Exhibit 6 at 290 (¶ 1010-1.01), 300-01 (¶ 2220-3)), does not suggest that the contractor should anticipate having to reconfigure slopes.

5. The contract explicitly states that the slope protection and erosion control system and geotextile underlayment "shall be installed in strict accordance with the manufacturer's specifications and recommendations. A certified copy of these installation specifications shall be submitted to the Contracting Officer for final review and approval." (Exhibit 6 at 304 (¶ 2270-3.01).) The requirement for installation in "strict accordance" with specifications and standards is repeated in the summary of work section of the contract (Exhibit 6 at 275 (¶ C.1.01.A.2)), and in a note on a drawing (Exhibit 6 at 363).

6. On June 23, 1999, the contractor provided to the Government the manufacturer's "specification guideline" for the articulating block system. The submission does not identify any maximum slope requirement or other parameters or limitations for acceptable slopes. (Exhibit 3 at 29A-29E).

7. The contract incorporates the Differing Site Conditions clause from Federal Acquisition Regulation (FAR) 52.236-2 (APR 1984) (Exhibit 6 at 308 (¶ H.1)). That 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 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 (1984).)

8. The contract incorporates the Changes and Changed Conditions clause from FAR 52.243-5 (APR 1984) (Exhibit 6 at 309 (¶ I.1)). That clause generally requires the contracting officer to make an equitable adjustment if an increase or decrease in the cost of, or time required for performing the work is affected by (i) subsurface or latent physical conditions differing materially from those indicated in the contract or (ii) unknown unusual physical conditions at the site.

Performance

9. At the time the contractor accepted the contract (Finding of Fact (FF) 1), the Government had not completed the initial fill slope and road restoration work. By June 15, 1999, the reshaping and regrading by the Government was complete; the contractor did not object to the work or indicate that the steepness was other than it had anticipated or not in conformance with manufacturer requirements. (Exhibit 4 at 133, 140-41.) Thereafter, the contractor visited the site with a representative of the manufacturer of the slope protection system. On June 30, the contractor notified the Government of the concerns of the manufacturer's representative regarding the existing slopes as being too steep. (Exhibit 4 at 140.) In a letter dated July 1, 1999, the contractor informs the contracting officer:

There are areas at the site which have slopes in excess of 1-1/2 to 1. The manufacturer of the specified mattress material has indicated that they will not warranty the installation of the material on slopes in excess of 1-1/2 to 1. A-Line Construction will only install this material in accordance with the specifications and guidelines set forth by the manufacturer. In order [to] facilitate the proper installation of the specified mattress material all slopes must be a minimum of 1-1/2 to 1 and be of a smooth consistent grade. These are the areas at the site in which the Forest Service did not grade according to the contracting specifications. A-Line's responsibilities under the contract were limited to compaction and trenching.

(Exhibit 3 at 32.)

10. Through a bilateral contract modification (with an effective date of July 6, 1999), the Government increased the contract price by \$7,518.25 (from \$93,760.50 to \$101,278.75) and increased by 24 days the time for performance (from 21 to 45 days), with the following explanation: "Additional site preparation work involving all necessary regrading, shaping, watering and compaction work as required to comply with the manufacture[r]'s installation and finished slope

requirements. Reference contractor[']s cost proposal dated 07-01-1999 which was reviewed and approved[.]” (Exhibit 6 at 264-65.)

11. The Government permitted the contractor to complete performance without attaining over some portions of the site what the parties recognized as a manufacturer requirement to have a maximum slope of 1-1/2 to 1. (Exhibit 5 at 229.) The record does not indicate the actual slopes attained and does not contain calculations or other information regarding the placement of the slope protection system over the actual slopes in question.

Dispute

12. As stated in its claim to the contracting officer, the contractor seeks to recover what it describes as increased labor and associated costs; the “claimed equitable adjustment to the contract price represents the difference between the original contract price, as modified, and the actual cost to complete the work” (Claim at 1 (Aug. 2, 1999)). For pumping on slopes steeper than 1-1/2 to 1, the contractor seeks to recover:

\$ 8,166 for 6 laborers (5 days each)
 \$ 2,000 for a supervisor (5 days)
 \$ 900 for pump standby time (15 hours)
 (based on slower rate of pumping on steep slopes)
 \$ 750 for concrete truck standby time (15 hours)
 \$ 1,000 cost to recalculate cable design
 \$ 3,600 extra time for manufacturer representative (6 days)
 (time calculated on time required to redesign
 panel layout, cable design and consultation
 regarding installation on steep slopes)

\$16,416.00 subtotal
 \$ 2,954.88 overhead and profit (18%)
 \$19,370.88 TOTAL

(Claim (Aug. 2, 1999), Enclosure 1.) The support for the hours and days and underlying costs are not apparent in the submission to the contracting officer or from the record.

13. The contracting officer denied the claim. His analysis of the differing site condition claim is a single sentence: “Contractor was aware prior to submitting his quote of the conditions of the project site, and the requirements to install his product” (Exhibit 1 at 2). His analysis of the changed condition claim is as follows: “Manufacturer’s installation instructions for the mat do[] not state a requirement for a slope requirement of 1 ½ to 1. Contractor is required to have the manufacturer’s representative onsite and it was only at this time was the issue of the slope brought up by the representative. The design is the Contractor’s responsibility, including the manufacturer’s requirements.” (Exhibit 1 at 3.) The decision contains the following explanation for the denial of the two claims: “Conditions at the site were ascertained by the Contractor, prior to submitting his

quote and after award while accepting the grading operation. The design to accom[mo]date the slope is the contractor's responsibility, including the warranty. Time was already given to the contractor, but no equitable adjustment is due." (Exhibit 1 at 3.)

14. In its complaint, the contractor seeks to recover \$46,262.44, as a result of what it characterizes as differing site conditions and defective specifications, under the Changes clause, itemized as follows:

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| \$22,539.44 | <p>ADDITIONAL SITE PREPARATION AND PRODUCT INSTALLATION COSTS</p> <p>\$7,966.88 197.2 sq yds add'l material @\$40.40/yd \$2,372.56 376 sq yds add'l earthwork @\$6.31/yd \$3,200.00 add'l cost to compact steep slopes \$9,000.00 10 days downtime (Jun 15-Jul 7, 2000)</p> |
| \$ 3,495.00 | <p>ADDITIONAL COSTS INCURRED AS RESULT OF GOVERNMENT INABILITY TO KEEP ROAD CLOSED TO PUBLIC ACCESS</p> <p>\$ 900.00 6 barricades stolen/destroyed @\$150/ea \$ 845.00 portable toilet vandalized/destroyed \$1,750.00 vandalism of backhoe</p> |
| \$16,416.00 | <p>ADDITIONAL COSTS INCURRED AS A RESULT OF PUMPING ON SLOPES STEEPER THAN 1-1/2 TO 1</p> <p>detailed above, FF 12, without overhead or profit</p> |
| \$ 3,812.00 | <p>ADDITIONAL COSTS INCURRED AS A RESULT OF GOVERNMENT REQUESTED/NECESSARY CHANGES IN CABLE DESIGN</p> |

(Complaint (Apr. 13, 2000) at 10-11.) The contractor recognized that it had not submitted a claim to the contracting officer relating to the second category of requested costs. It opted not to submit a claim; instead, it opted to proceed with the remaining issues. (Memorandum of Telephone Conference Held Aug. 15, 2000.) The support for the hours, costs, and square yardages is not apparent in the record.

15. In response to the complaint, the Government maintains that the steepness of the slopes did not cause any measurable cost increase, and, even if the slopes presented serious problems, the steepness was obvious from the beginning, and the contractor could not have concluded reasonably that the slopes would be graded to the more gradual slopes the contractor sought to attain (Government Pre-hearing Submittal (June 8, 2000)). A later supplied declaration by the contracting

officer's representative, who is also a civil engineer for the Forest Service, supports the assertions (Declaration (Sept. 11, 2000)).

16. In its amended complaint, the contractor seeks to recover \$97,297.67. In addition to the amount in its complaint (\$46,262.44), it seeks \$51,035.23, itemized as follows:

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| \$37,315.23 | daily costs from concrete mix installation |
| 12,320.00 | down time (concrete curing/testing), misc expenses |
| 1,400.00 | costs for additional 376 sq yds of preparation |

(Amended Complaint (June 13, 2000).) The contractor recognized that it had not submitted a claim to the contracting officer relating to these items. It opted not to submit a claim; instead, it opted to proceed with the other issues properly before the Board. (Memorandum of Telephone Conference Held Aug. 15, 2000.)

17. The record does not indicate how the contractor arrived at its pricing for the contract, or any of its underlying assumptions with respect to the slopes at the site. As noted above, FF 9, upon initially viewing the site as completed by the Government, the contractor posed no concern or provided no indication that the slopes differed from its assumptions underlying its pricing of the contract. (Exhibit 4 at 140.) Nothing in the record demonstrates that the contractor performed under conditions varying from what it anticipated after viewing the site prior to contracting. Nor does the record justify the additional time or dollars said to relate solely to work on the allegedly steeper-than-expected slopes.

DISCUSSION

The contractor seeks to recover the difference between the modified contract price and what it describes as its actual cost to complete the work. In support of its request, the contractor references the Differing Site Conditions and the Changes clauses. Here, the contractor seeks to recover for what it asserts are costs incurred for pumping on slopes steeper than 1-1/2 to 1 (FF 12), and for additional site preparation, product installation, and cable design costs (FF 14).

The Board is not bound by the findings, analysis, or conclusions of the contracting officer, 41 U.S.C. §§ 605(a), (b). Here, the record does not support fully the analysis of the contracting officer (FF 13).

At the time of contracting, the contractor was not aware of the requirements to install the slope protection system. The contractor was not responsible to design the entire project. On the other hand, the contractor is under the unsupportable impression that all of its costs are compensable under the contract, which is a fixed-price (not a cost-reimbursement) contract. The mistaken analyses and conclusions expressed by the contracting officer and the contractor have not furthered the resolution of this dispute.

As awarded, the Government was to provide an area ready to accept the slope protection system with the contractor to provide recompaction and wetting; the contractor was not obligated to perform regrading operations (FF 3, 4). When it was determined that the Government-prepared site was not

acceptable for the slope protection system carrying the manufacturer's warranty, the parties entered into a bilateral contract modification; the contractor became obligated to perform all necessary regrading and shaping, as well as other work. The contractor obtained a price increase of \$7,518.25 and additional time for performance. (FF 9, 10.) Thereafter, the Government did not demand compliance with the terms of the modified contract, as the Government permitted completion with slopes steeper than the manufacturer suggested (FF 11).

The contractor seeks additional compensation for performing on the steeper slopes (FF 12, 14). The record does not establish a basis for relief (FF 17). The record does not demonstrate that the contractor priced its quotation with the assumption, or expected at the time of accepting the contract, that the Government would provide a site with slopes of any particular steepness. The contractor did not take issue with the Government-prepared slopes until a manufacturer's representative voiced concerns. The actual conditions encountered both before and after the contract was modified (with the contractor doing some regrading) have not been shown to be unusual or unexpected for the installation. Nothing in the product submissions to the Government indicates that particular slopes would be unacceptable (FF 6).

Even assuming (without so deciding) that the slopes were steeper than the contractor anticipated when it priced the contract, the record does not demonstrate that the claimed hours or costs were incurred or attributable to the differences in slopes. While the record remained open, the Government focused upon this lack of proof (FF 15). The contractor has failed to substantiate its claim. Therefore, the claim for \$19,370.88 (and \$16,416.00, without overhead and profit) (FF 12, 14), fails.

The record does not demonstrate that the contractor incurred site preparation or product installation costs in addition to those required and paid for under the contract, as modified (FF 10). Accordingly, the claim for \$22,539.44 (FF 14) fails.

The contract required the manufacturer to design and certify cable sizing, to be provided by the contractor (FF 1). The record does not establish any Government requested or necessary changes in cable design that required the contractor to incur additional costs or costs in the amounts claimed. Accordingly, the claim for \$3,812.00 (FF 14) fails.

DECISION

The Board denies the appeal.

JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
June 18, 2001