

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Mass Construction Group, Inc.) ASBCA No. 55440
)
Under Contract No. W912KC-04-C-0020)

APPEARANCE FOR THE APPELLANT: Raymond L. DeLuca, Esq.
Pepper Hamilton LLP
Philadelphia, PA

APPEARANCES FOR THE GOVERNMENT: COL Samuel J. Rob, JA
Chief Trial Attorney
LTC Brian J. Godard, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PAUL
PURSUANT TO BOARD RULES 12.3 AND 11

This is a timely appeal of a contracting officer's (CO) decision denying appellant Mass Construction Group, Inc.'s (Mass) claim for a differing site condition in an amount of \$81,372.77. Mass opted to use the accelerated procedures provided by Board Rule 12.3; and the parties agreed to submit the appeal on the record pursuant to Board Rule 11. The Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, is applicable; and only issues of entitlement are before us for decision.

JURISDICTIONAL ISSUE

After the parties filed two sets of briefs on the merits, the Army submitted a partial motion to dismiss for lack of jurisdiction. It contended that the Army's assessment of liquidated damages against Mass was not properly before the Board because it was not the subject of a claim and a CO's final decision. Mass opposed the motion, arguing that the matter of liquidated damages was inextricably connected to its requested extension of the contractual completion date.

In the differing site condition claim which it filed on 4 October 2005, Mass did not even mention the issue of liquidated damages (R4, tab 76, attach. R). Moreover, in the final decision which she issued on 16 February 2006, the CO, SMSgt. Linda M. Corcoran did not even allude to the question of liquidated damages (R4, tab 76, attach. S). Indeed, Mass's first reference to this issue appeared in the initial brief which it filed on 1 September 2006 (app. br. at 18). Because the Army's purported assessment of

liquidated damages has not been the subject of a CO's final decision, we lack jurisdiction to review this issue. Accordingly, the Army's partial motion to dismiss is granted.

SUMMARY FINDINGS OF FACT

1. The Pennsylvania Air National Guard issued Solicitation No. W912KC-04-R-0012-0004 on 30 April 2004 for construction of a "Special Mission Equipment Maintenance Facility at 193rd Special Operations Wing, Middletown, Pennsylvania" (R4, tab 1 at 1). As stated in the sworn declaration of Mr. Richard M. Ketner:

The 193rd Special Operations Wing ... is located on the eastern end of the Harrisburg International Airport in Middletown[,] Pennsylvania, approximately 5 miles southeast of Harrisburg. The Airport is bounded by the Susquehanna River to the south and the Swatara Creek to the east. A smaller creek, Post Run, is located on the Airport property and runs along the Base's eastern property line. The Airport's runways and facilities are parallel to the River. Due to the close proximity to the [R]iver, the [A]irport is surrounded by a levee extending to a height of approximately 15 feet.

(Resp. br., attach. 1 at 1).¹

2. On 18 April 2003, in preparation for commencement of work on the underlying project, respondent had employed Gannett Fleming Engineers and Planners to conduct soil boring tests to determine subsurface conditions, including the water table. The tests demonstrated that the water table was located between three and one-half and six feet below the surface (R4, tab 11). After these tests were conducted but prior to the offerors' site visit, the area was completely graded. This resulted in the removal of several inches of soil and a concomitant rise in the level of the water table (Resp. br., attach. 4 at 1).

3. The solicitation provided that the offerors were "urged and expected to inspect the site where the work will be performed." Accordingly, "an organized site visit" was scheduled for "10:00 a.m., Local time, 12 May 2004" (R4, tab 1 at 31). In conjunction

¹ Mass disputes that Post Run is a creek and, instead, argues that it is a "drainage ditch" (app. br., affidavit of Mr. Sola at 2). The Board finds that a "body of water" ran along the Base's eastern property line approximately 15 feet from the edge of the work site (R4, tab 8).

