



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: August 30, 2012

CBCA 2057

POWER WIRE CONSTRUCTORS,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Ronald G. Schmidt of Schmidt, Schroyer, Moreno, Lee & Bachand, P.C., Rapid City, SD, counsel for Appellant.

Claire Douthit, Office of General Counsel, Department of Energy, Lakewood, CO, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **GOODMAN**, and **KULLBERG**.

GOODMAN, Board Judge.

Appellant, Power Wire Constructors, appeals a final decision issued by a contracting officer of respondent, Department of Energy, denying its claim. The parties have filed motions for summary relief. We grant each party's motion in part, resolving all issues in this appeal.

Background

On August 5, 2008, appellant was awarded a contract (the contract) for the construction of an electrical power substation located in the vicinity of Mitchell, South Dakota. The work pursuant to the contract has been completed.

By letter dated January 28, 2010, appellant submitted a certified claim pursuant to the Contract Disputes Act (claim) demanding payment of \$503,071.38. The contracting officer issued a final decision dated March 23, 2010, denying the entire claim. On June 23, 2010, appellant filed a notice of appeal.

On September 10, 2010, appellant filed a complaint seeking \$475,331.98, consisting of: (1) extra costs allegedly resulting from appellant's inability to use a proposed borrow area -- \$46,596.23 for stripping and reclaiming of the denied area and \$335,960.26 for additional costs resulting from direction to use another borrow area instead of the denied area; (2) \$48,154.93 for extra costs arising from delivery of gravel allegedly necessary because of the denial of the use of the proposed borrow area; (3) \$41,706 for transformer oil installation and processing;¹ and (4) \$2914.56 for reimbursement of costs associated with a Freedom of Information Act (FOIA) request.²

Respondent filed a motion for summary relief on December 28, 2011. Appellant filed a cross-motion and response on March 23, 2012. Thereafter, various responses and replies were filed by the parties, with the Board directing additional briefing on specific issues.

Extra Costs Allegedly Resulting from Inability to Utilize Proposed Area 5

The relevant contract provisions are contained in Division 2 of the contract, entitled "Sitework":

Bidding Schedule item "Borrow Excavation" includes all borrow material required. The contractor shall make arrangements for obtaining borrow material, off Government property and rights of way, including transporting and stockpiling prior to placement. Borrow material shall be suitable material, as determined by the COR [contracting officer's representative], and be an acceptable gradation to provide compacted embankments and refill in areas where foundations are removed. Borrow material shall contain sufficient clay to prevent excessive caving of auger-type excavations.

¹ Respondent does not dispute \$15,000 of this claim. This decision applies only to the amount that remains in dispute.

² This request for reimbursement of costs was not included in appellant's certified claim or addressed in the contracting officer's final decision. After filing its motion for summary relief, appellant withdrew this request from the appeal, stating that it "will claim these costs pursuant to [Board] Rule 30."

Prior to obtaining borrow material, notify the COR of proposed location(s). Provide a site map for each borrow location on a 7.5 minute quadrangle map or better; indicate the size of the borrow area; and indicate the amount of borrow needed. Western^[3] will require a minimum of 60 days to perform environmental and cultural resource clearance surveys of the proposed site(s) in accordance with the State Historical Preservation Act. If environmental and cultural resource clearance surveys have been previously performed in accordance with the State Historical Preservation Act, submit documentation for approval at least 14 days prior to the start of the borrow work. No excavation at the proposed borrow location(s) shall be performed until approved by Western. . . .

Bidding Schedule item “Stripping” includes stripping topsoil to a depth of 6” from the following areas on which compacted embankments are required to be placed and in which excavation is required: Substation site. Access road. Borrow Area.

The reference in the contract provision above to the State Historical Preservation Act refers to South Dakota Codified Law 1-19A-11.1 and the role of the Office of the State Historic Preservation Officer (SHPO). The requirements for state historical preservation programs are found in the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 *et seq.* (2006). The NHPA states that “the historical and cultural foundations of the Nation should be preserved as a living part of community life and development in order to give a sense of orientation to the American people.”

Pursuant to Section 106 of the NHPA, 16 U.S.C. § 470(f), a federal agency engaged in a “federal undertaking” is required to take into account the effect of the undertaking on any site, building, structure, or object that is included in or eligible for inclusion in the National Register of Historic Places (National Register). An “undertaking” is defined as a “project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including those carried out by or on behalf of a federal agency; those carried out with federal financial assistance; and those requiring a federal permit, license or approval.” 36 CFR 800.16(y) (2008)

The contract was an “undertaking” as defined by the NHPA. As such, the areas used for construction were protected in conjunction with procedures established by statute and

³ The division of respondent that entered into the contract with appellant is the Western Area Power Administration, referred to in the contract as “Western.”

regulation. The protection of these areas involved decisions made by respondent as the result of coordination with the SHPO.⁴

The general process a federal agency follows under Section 106 and its implementing regulations contains the following steps. First, the agency evaluates the undertaking, determines the area of potential effect, has the area surveyed for sites eligible for listing on the National Register, evaluates the results of the survey, and determines whether the undertaking is likely to cause an adverse effect to an eligible site. If the undertaking has the potential to have an adverse effect, the agency can propose avoidance measures. The agency then provides the cultural resource survey and recommendations regarding the effect on the site and any proposed avoidance measures to the SHPO and any other interested parties. The SHPO reviews the agency recommendation and the survey and can concur or disagree with the agency finding. The SHPO also can propose additional restrictions on the undertaking in order to avoid, minimize, or mitigate an effect. Upon the agency's receipt of the SHPO's concurrence, the agency evaluates whether to incorporate the additional proposed restrictions. If the agency incorporates the restrictions, the agency may authorize the undertaking to proceed, provided all other applicable legal requirements have been satisfied.

The principal issue in this appeal involves the requirements of the contract and the NHPA with regard to approval of proposed areas for borrow material. After contract award, appellant proposed borrow areas for use. On September 10, 2008, respondent conducted the surveys required by the NHPA and submitted a report concerning three proposed borrow areas to the SHPO. On September 16, 2008, the SHPO concurred in respondent's determination that no historic properties were affected in these three areas and respondent notified appellant of the SHPO's concurrence and approved the commencement of work in these three borrow areas.

Two more borrow areas were proposed by appellant. The fourth proposed area was withdrawn from consideration by appellant before it was considered by respondent. Appellant's claim involves respondent's denial of use of its fifth proposed borrow area (proposed area 5). Proposed area 5 originally comprised approximately eight acres; subsequently another contiguous eight acres was added. As required by the NHPA, respondent surveyed proposed area 5 and found within it a site (the site) that was considered administratively eligible for inclusion on the National Register. Respondent recommended

⁴ Appellant asserts that private land proposed as borrow areas is exempt from the NHPA and state requirements in conjunction with that statute. The sections of South Dakota Law cited by appellant, SDCL § 1-20-18 *et seq.*, do not exempt private lands from the requirement of the NHPA.

to the SHPO that proposed area 5 could be used as a borrow area if appellant placed a twenty-five foot buffer around the site to protect it during the construction process.

On September 23, 2008, the SHPO accepted respondent's recommendation and issued a letter stating that proposed area 5 could be used for borrow material provided the twenty-five foot buffer could be placed around the site. However, during the morning of September 23, 2008, before receiving approval from respondent to work in proposed area 5 under conditions stated in the SHPO's letter of the same date, appellant began stripping the area, removing the topsoil.

As a result of appellant's stripping the area prior to approval of proposed area 5 as a borrow area, on September 24, 2008, respondent directed appellant to cease work in proposed area 5 until further notice. Later in the afternoon, after appellant had been directed to cease work, the tenant farmers who were leaseholders of proposed area 5 arrived with a front end loader and a dump truck and removed material from the site, thereby destroying the site. Once the site was destroyed, respondent advised the SHPO of this occurrence, and the SHPO verbally advised respondent that no further construction activity should occur in proposed area 5. By letter dated October 1, 2008, the SHPO confirmed her direction that no further activity should occur in proposed area 5.

By letter dated October 3, 2008, respondent advised appellant as follows:

Pursuant to [respondent's] obligation under the NHPA, [respondent] needs to make a final determination regarding the site's eligibility and, if appropriate, conduct a damage assessment to the site and determine, what, if any, mitigation is appropriate. No work could occur in borrow area 5 during this process, even if [respondent] approved the borrow area. Moreover, the historical material from [the] site . . . has been spread throughout the borrow area, and therefore, the entire disturbed area could contain cultural resource fragments.^[5]

Appellant was therefore directed not to use proposed area 5 for borrow material and ultimately used borrow area 3, which respondent had approved. Appellant seeks

⁵ The resolution of appellant's claim does not require us to determine whether there was historical material in proposed area 5 and in the site that was destroyed. Rather, we must determine whether respondent's determination, after proposed area 5 was stripped and the site destroyed, to preclude appellant from using proposed area 5 as a borrow area was a breach of contract.

compensation for extra costs allegedly incurred in having to use the other, approved borrow area.

Gravel Transportation Costs

Claimant alleges that it incurred extra costs for transportation of gravel on an access road because it was forced to use borrow area 3 when proposed area 5 was not approved. The extra costs allegedly were incurred because claimant believes it was entitled to use area 5 for borrow material and therefore any costs in excess of those which would have been incurred if area 5 had been used are due as additional compensation.

Transformer Costs

The transformer at issue was furnished by respondent without oil. Respondent subsequently delivered the oil in a tank truck and appellant paid to have the oil transferred from the tank truck to the transformer. Appellant seeks the costs of transferring the oil from the tank truck to the transformer.

The relevant provisions of the contract read as follows:

[Respondent] will furnish the oil . . . for Government furnished equipment. . . .

1) Transformers. . . . Oil for transformers will be delivered to the Contractor in tank trucks at the substation site, or the transformer manufacturer may ship transformers filled with oil.

Appellant interprets this language to mean that respondent will furnish oil for government furnished equipment, whether or not the transformer is shipped with oil. If the transformer is shipped without oil, the oil will be delivered to the contractor in tank trucks and the Government will bear the cost of transferring the oil from the tank truck to the transformer. Respondent asserts that the contractor is to bear the cost of transferring the oil from the tank truck if the transformer is not shipped filled with oil.

Discussion

Respondent's motion, while captioned as a motion for summary relief, is also submitted as a motion to dismiss for failure to state a claim upon which relief can be granted. In general, a case can only be dismissed for failure to state a claim upon which relief can be granted when that conclusion can be reached by looking solely upon the pleadings. *Tomas Olivas Ibarra v. Department of Homeland Security*, CBCA 1986, 10-2 BCA ¶ 34,573. The

parties refer to materials outside the pleadings in their respective filings, so we consider this motion as a motion for summary relief. *A to Z Wholesale v. Department of Homeland Security*, CBCA 2110, 11-1 BCA ¶ 34,674; *Metlakatla Indian Community v. Department of Health and Human Services*, CBCA 282-ISDA, 09-2 BCA ¶ 34,279.

Summary relief is appropriate only where there is no genuine issue as to any material fact (a fact that may affect the outcome of the litigation) and the moving party is entitled to relief as a matter of law. Any doubt on whether summary relief is appropriate is to be resolved against the moving party. The moving party shoulders the burden of proving that no genuine issue of material fact exists. *Patrick C. Sullivan v. General Services Administration*, CBCA 936, 08-1 BCA ¶ 33,820.

Borrow Area Costs

The contract was clear that there was no guarantee that any specific site would be approved for borrow material unless the requirements of the NHPA were met. Appellant alleges that respondent breached the contract by wrongfully directing it not to use proposed area 5 for borrow material. Appellant also alleges in its complaint that respondent has also breached its implied contractual obligation of good faith and fair dealing, is guilty of arbitrary and capricious actions and abuse of discretion, and is in breach of reasonable construction standards.

Costs for Stripping and Reclaiming Proposed Area 5

Appellant seeks reimbursement of costs incurred in stripping and reclaiming proposed area 5. Appellant was advised by respondent before it began stripping proposed area 5 that the contract prohibited stripping (removal of the top six inches of the soil) until excavation of a borrow area was approved. Proposed area 5 was not approved as a borrow area when the stripping occurred or thereafter.

Appellant's interpretation that the contract allows stripping before approval of use of borrow material is not consistent with the plain meaning of the contract. The contract clearly refers to stripping in areas "in which excavation is required" and further indicates that such an area would be a "Borrow Area." The plain meaning of the term "borrow area" is an area from which borrow material is allowed to be removed, i.e., an approved borrow area. "Borrow area" cannot be interpreted in this context as a proposed borrow area for which approval to remove borrow material has not been received. While stripping and excavation are two distinct operations, it was unreasonable for the contractor to assume that one may strip the top layer of soil from an area that might possibly contain historic artifacts before

approval to perform excavation on the area is received.⁶ Until a proposed borrow area is approved, any work performed is at the contractor's risk. As we find that respondent did not wrongfully deny appellant's use of borrow area 5, appellant cannot recover its costs incurred in stripping the area prior to receiving approval for its use for borrow material and having to reclaim the area thereafter.

Excavation of Borrow Area

Appellant alleges that borrow material could still have been obtained from proposed area 5, even though it had stripped the proposed area and the site had then been destroyed. Appellant maintains that the destruction of the site by the tenants on the property was minimal in comparison to the overall area. Thus, appellant believes that regardless of the destruction of the site, it could have been directed to avoid the immediate area of destruction and still be allowed to remove borrow material.

Based upon appellant's stripping of proposed area 5 without approval, contrary to the contract, and the tenants' deliberate destruction of a potential historical site, the SHPO decided to bar any further activity in proposed area 5. This decision was within the SHPO's authority to determine, and there is no evidence that the decision was arbitrary or capricious. It was reasonable for respondent to concur with the SHPO's decision. It was also reasonable for respondent to bar all construction activity within proposed area 5 pending its own investigation of the destruction of the site by the tenants and the possibility that historical material was scattered throughout the site. Such decision was neither arbitrary, capricious, nor an abuse of discretion. Accordingly, respondent's refusal to approve proposed area 5 as a source of borrow material was not a breach of contract. In so doing, respondent fulfilled its obligations pursuant to the NHPA.

Gravel Transportation Costs

Appellant's claim with regard to gravel transportation costs is premised on a determination that respondent breached the contract by not approving appellant's use of borrow area 5, thereby forcing appellant to use another borrow area, which delayed the work. As respondent did not breach the contract as alleged by appellant, appellant is not entitled to these costs.

⁶ Appellant asserts in support of its interpretation that respondent now explicitly requires prior approval for stripping in borrow areas in its contracts. The language of other contracts is not relevant here. Appellant's interpretation of the contract at issue is not supported by the plain meaning of the contract.

Appellant is Not Entitled to its Claims for Borrow Area Costs

As there are no issues of material fact in dispute, and appellant is not entitled to its claim as a matter of law with regard to alleged costs relating to the denial of proposed area 5 as a borrow area, we grant respondent's motion for summary relief on this claim.

Transformer Oil Processing Costs

The contract states that respondent was required to furnish oil for a government-furnished transformer. Appellant maintains that the Government's obligation "to furnish oil" for the government-furnished transformer includes the cost of transferring the oil from the tank truck to the transformer if the transformer is shipped to the construction site without oil. Respondent argues that appellant should have known that a transformer as large as the one at issue is shipped without oil. While respondent acknowledges it was required to bear the costs of the oil and transporting it the construction site to be placed in the transformer, it believes that the contract did not obligate the Government to pay for the transfer of the government-furnished oil from a tank truck to the transformer.

Respondent's interpretation is not reasonable. The specification implies that the Government will bear the cost of furnishing the oil whether the transformer is shipped with oil or not, and poses both possibilities to bidders. There is nothing in the specification to require the bidder to include a contingency in the contract for transferring oil from a tank truck if the transformer is shipped without oil.⁷ There are no issues of material fact in dispute. Appellant's motion for summary relief for this claim item is granted.

Decision

Respondent's motion for summary relief is granted with regard to appellant's claims for costs associated with the denial of use of borrow area 5. Appellant's motion for summary

⁷ Respondent relies upon an affidavit from a subcontractor who submitted a bid to appellant for the transformer stating that the subcontractor reviewed the bid documents, concluded the transformer would be shipped without oil, and therefore included the price of transferring the oil in his bid to appellant. Appellant alleges that it did not receive this subcontractor's bid until after its own bid had been submitted, and therefore did not rely upon the subcontractor's interpretation of the contract or bid price to prepare its bid. The subcontractor's conclusions and actions during the bid preparation process cannot vary the plain meaning of the contract between appellant and respondent.

relief is granted with regard to appellant's claim for costs associated with processing of transformer oil. Accordingly, the appeal is **GRANTED IN PART**.

ALLAN H. GOODMAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

H. CHUCK KULLBERG
Board Judge