

COMMONWEALTH OF PENNSYLVANIA

ALLAN A. MYERS, INC. : BEFORE THE BOARD OF CLAIMS
:
VS. :
:
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF TRANSPORTATION : DOCKET NO. 1540

FINDINGS OF FACT

1. Allan A. Myers, Inc. ("Myers") is a Pennsylvania Corporation with its principal place of business at P.O. Box 98, Worcester, PA. (Complaint/Answer para 1)

2. Commonwealth of Pennsylvania, Department of Transportation ("DOT") is an executive agency of the Commonwealth of Pennsylvania having its principal offices at the Transportation and Safety Building, Harrisburg, Pennsylvania. (Complaint/Answer para 2)

3. On or about September 5, 1990, Myers and DOT entered into a contract for the construction of a section of highway and a bridge in Montgomery County, PA, being a section of State Route 4044. (P/D 1, P/D 2, Complaint/Answer para 3)

4. Myers completed a pre-bid investigation which included an examination of the site of the work, a review of the construction drawings and plans, and the conditions of the contract and specifications. (N.T. 25, New Matter/Reply to New Matter para 58)

5. The boring logs in the bid documents indicated that much of the Class 3 excavation for the bridge abutments would be extremely high in moisture content. (N.T. 36-37, PD-1, Sheets 23 & 24).

6. There was insufficient legal right-of-way within the Project limits for stockpiling, spreading and drying all the wet, but otherwise suitable material from Class 3 excavation for the bridge abutments. (N.T. 60-61, 101-102; PD-1, P-1, P-2, P-4)

7. The contract, regarding legal rights-of-way, provided in part, as follows:

"The Department (PaDOT) will be responsible for securing all necessary rights-of-way in advance of construction. Any exceptions will be indicated in the proposal and contract."

(PD-2, PD-3, P-15, Complaint/Answer para 9)

8. Within the terms of the contract, wet excavated material may be suitable when dried. (408 Specifications Section 206.2)

9. Myers had a choice of stock piling and drying the excavated material or wasting the wet suitable material and replacing it with foreign borrow at no additional cost to DOT. (N.T. 117, 139, 140)

10. No written change orders regarding the excavated material have been placed on the record in this case.

11. Myers submitted force-account records for work performed under the contract. (Exhibit P-12, P-13, P-14)

12. Myers placed an additional 2,936 pounds of reinforcement bars on the job for which it is entitled to be paid.

CONCLUSIONS OF LAW

1. The Board of Claims has jurisdiction over the subject matter and the parties in the case at bar.

2. The contract language regarding the rebars is ambiguous and Myers is entitled to recover the cost of 2,936 pounds of reinforcement bars in the amount of \$2,143.28.

3. Myers is not entitled to recover any claim for damages for extra work resulting from contract changes.

4. Myers is not entitled to any claim for damages calculated on a force-account basis.

5. Myers is not entitled to recovery for any unexpected work performed because of the location of a utility pole at the work site.

6. The Board's Findings of Fact are supported by substantial, relevant evidence such as a reasonable mind might accept as adequate to support its Conclusions of Law.

OPINION

This matter came before the Board of Claims upon a Complaint filed by the Plaintiff, Allan A. Myers, Inc., hereafter ("Myers") against the Defendant, Commonwealth of Pennsylvania, Department of Transportation, hereafter ("DOT") wherein Myers demands payment from DOT for damages sustained by way of extra work required to complete the project set forth in a contract between Myers and DOT, entered on or about September 5, 1990 providing for the construction of a section of highway and a bridge in Montgomery County, PA (the "Project").

In connection with the construction of the Project, Myers was required to perform certain classes of excavation. Such excavation is the basis upon which most of Myers' claim rests. The contract documents contained an item which set forth the approximate estimated quantities of material in each class of excavation.

The Board is unable to ascertain from the specifications or the contract, any proclamation of the percentage of excavated materials to be wasted. We are unable to determine that DOT directed any excavated wet material to be wasted and replaced with

foreign borrow. The testimony which we believe is determinative of the issue comes from Rodney Libby, an employee of Myers on direct examination by counsel for Myers, to wit:

Q: Mr. Libby, by whom are you currently employed?

A: Allan A. Myers, Inc.

...

Q: When you encountered the wet material, did you have any conversations directly with Mr. Bucher (DOT's Project Engineer)?

A: Yes, I asked him if this material would be suitable to build embankment.

...

Q: Okay. What was your discussion with Mr. Bucher specifically?

A: My discussion was with him, "Bill are we going to be able to use this material to build embankment"? And he said "Yes". I said, "Well it is awful wet." His direction to me was, "We will be able to use it." I said, "Are you telling me its usable material?" He said "Yes, I am telling you it's usable material, but not at this time." N.T. 93,94,97,98,99,100

Mr. Libby's testimony is clear that Myers was told and understood that DOT's position was that the material, although wet, was suitable material as defined in the contract specifications:

"Suitable Material. Reasonably free of organic matter coal or coal blossom or other objectionable matter. Wet, dry or frozen material may be suitable when dried, wetted or thawed, respectively.

Suitable material, including wet or frozen material, may be wasted only with written authorization and is subject to replacement in equivalent volume."

The Board of Claims is inclined to agree with DOT in its determination that the relevant Class 3 excavation was "suitable" under the contract even though it was wet and unable to be used immediately without being dried.

Myers testified that it anticipated using foreign borrow material to replace wet Class 3 excavation from the inception of the contract. (N.T. 62). DOT, with benefit of the same contract, seemingly did not expect the Class 3 excavation to be wasted as unsuitable. The Board of Claims has not been alerted to an issue of ambiguity in the contract regarding any Class of excavation and finds none here. It would have been incumbent upon Myers to raise the existence of a patent ambiguity and attempt to resolve the issue prior to excavation of the material on the Project. In as much as Myers availed itself of a pre-bid inspection of the project site it was bound to raise questions and exceptions to the bid specifications at the bidding phase of the contractual relationship rather than at the compensation phase of the Project. Regarding the duty of public contractors, we are impressed that such contractors must be alert to glaring mistakes, oversights and ambiguities and are bound to raise and discuss the same with the owner before proceeding with the work. See, Penn-Ohio Painters,

Inc. v. DOT, Board of Claims Docket No. 668 (1984).

Myers repeatedly asserts that DOT directed it to stockpile excavated material on site to the detriment of Myers. The Board is not convinced, by testimony or otherwise, that DOT directed such stockpiling. To the contrary we find that Myers' decision to stockpile excavated material was its own decision based upon the economics of the Project. DOT stated, without reservation, that the excavated material was "suitable material" which could only be removed from the project site if it was replaced at no cost to DOT. We further note, and we opine, that the insufficiency of storage space for wet material on site was not a situation created by DOT, rather such condition may have stemmed from Myers' plan to perform the required excavation during the months of November, December and January. Therefore, we do not attribute to DOT the additional cost of the excavation items incurred by Myers. Extra work for which a contractor is entitled to receive compensation does not generally include work rendered necessary by unanticipated difficulties in the absence of fraud or misrepresentation. See Security Painting Co. v. Commonwealth of Pennsylvania, Department of Transportation 357 A.2d 251 (1976).

It appears from the Notification of Final Quantities and Contract Settlement amount (Plaintiff's Exh. 10) that Myers

provided 1,934.66 cubic yards of foreign borrow for which it was paid the contract unit price of \$9.00 per cubic yard for a total of Seventeen Thousand Four Hundred Eleven Dollars and Ninety-Four Cents (\$17,411.94). Myers is not entitled to payment for the 3,358 cubic yards which was set forth as an approximate quantity of foreign borrow on sheet 3 of 8 of the construction drawings.

In regard to rights-of-way, it is admitted that certain contract work to be performed by Myers was outside of DOT's right-of-way at the inception of the contract. Upon notice of the shortfall of DOT's right-of-way, DOT immediately obtained the authorization to enter the abutting property without substantial impact or delay in the work to be performed by Myers in accordance with the contract.

It is the Board's opinion that the problems alleged by Myers, in its Complaint, concerning a utility pole in the work area were problems, the solution of which fell to Myers, not DOT. The utility pole's position was clearly shown on the relevant drawings for the construction and Myers knew or should have known that said utility pole would pose a problem and should have had due regard for such contingent problems in formulating its bid.

Myers, in it's Complaint, has set forth a claim in the amount of Two Thousand One Hundred Forty-Three Dollars and Twenty-Eight Cents (\$2,143.28) as an extra work item for providing 675 epoxy-coated reinforcement bars which were necessary in the bridge construction phase of the Project, but were not indicated on a reinforcement bar schedule on structure drawing number 20 of 24.

DOT contends that the reinforcement bars in question were a part of the lump sum bid for the bridge structure and should not be paid as extra work. Notwithstanding the lump sum nature for the bridge construction item of the contract, it is admitted that 675 did appear in the documents as the number of epoxy-coated reinforcement bars required. Although that number was in error and, thereafter, correctly set forth as 1350 in the actual structure drawings we find that such error created an ambiguity in the contract which reasonably may have caused Myers to miscalculate the re-bar component to its detriment. The Board of Claims, therefore, determines that Myers should be compensated for 2,936 pounds of reinforcement bars (675 rebars) at the cost of 73 cents (\$.73) per pound in the total amount of Two Thousand One Hundred Forty-Three Dollars and Twenty-Eight Cents (\$2,143.28).

Myers, persistently, raises the issue of significant changes to the instant contract that would warrant a change order

for extra work and calculation of the cost of such extra work on a force-account basis. The Board finds no such significant changes to the contract and DOT has adamantly denied such changes. We, therefore, deny any alleged damages calculated on a force-account basis.

ORDER

AND NOW, this day of , 1996, after due consideration of the record and submissions of the parties to the action, it is hereby **ORDERED** and **DECREED** that an award is made in favor of the Plaintiff, Allan A. Myers, Inc. and against the Defendant, Commonwealth of Pennsylvania, Department of Transportation in the amount of Two Thousand One Hundred Forty-Three Dollars and Twenty-Eight Cents (\$2,143.28). In all other regards, the Plaintiff's Complaint is **DISMISSED**.

Upon receipt of said award Plaintiff shall forthwith file with the Board of Claims a Praeceptum requesting that the matter be marked settled, discontinued and ended with prejudice.

Each party to bear its own costs and attorneys' fees.

It is so **ORDERED**.

BOARD OF CLAIMS

David C. Clipper
Chief Administrative Judge

Opinion Signed
November 7, 1996

Louis G. O'Brien, P.E.
Engineer Member

James W. Harris
Citizen Member