

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Marine Industries Northwest, Inc.) ASBCA No. 51942
)
Under Contract No. N00024-92-H-8621)

APPEARANCE FOR THE APPELLANT: John R. Spencer, Esq.
Victoria E. Hatch & Associates, LLC
Tacoma, WA

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.
Navy Chief Trial Attorney
James D. Beback, Esq.
Counsel
Supervisor of Shipbuilding,
Conversion and Repair
Everett, WA

OPINION BY ADMINISTRATIVE JUDGE DICUS

Marine Industries Northwest, Inc. (MINI or appellant), appeals from a contracting officer's final decision denying the contractor's \$166,580.32 certified claim for equitable adjustment. MINI's claim is based on additional work required to remove mill scale from the metallic surfaces of the shipping barge NESTUCCA prior to repainting. MINI contends a prudent contractor would not expect to find mill scale on a vessel already in service for the Navy; therefore, it was appropriate to omit the cost of mill scale removal from the contract bid. The parties have waived a hearing pursuant to Board Rule 11. Only entitlement is at issue. We deny the appeal.

PRELIMINARY MATTERS

Respondent submitted evidence six months after the record was settled accompanied by a Motion to Reopen. Appellant objects to the receipt of the evidence into the record. Respondent's motion is untimely and it has not established a compelling reason to reopen the record. The motion is denied.

FINDINGS OF FACT

1. In June of 1998, the United States Navy awarded appellant contract N00024-92-H-8621 for dry-docking service and overhaul of the shipping barge NESTUCCA (the barge) for the firm-fixed price of \$991,571. The contract contained, *inter alia*, FAR 52.233-1

DISPUTES (OCT 1995) and FAR 52.243-7 NOTIFICATION OF CHANGES (APR 1984). The contract did not contain a “Differing Site Conditions” clause or equivalent. (R4, tab 1)

2. As part of the overhaul, the barge, including its tanks, was to be painted. However, prior to painting, work item 123-16-001, for the preservation of the tanks, required an abrasive blast to near-white metal in accordance with the STEEL STRUCTURES PAINTING COUNCIL, SURFACE PREPARATION SPECIFICATION NO. 10 (SSPC-SP-10). (R4, tab 3) SSPC-SP-10 defines a near-white blast as follows: “[a] near-white blast cleaned surface, when viewed without magnification, shall be free of all visible . . . mill scale” (R4, tab 7 at 4) The contract makes no representation as to the existence or nonexistence of mill scale. The barge had been modified in 1995 to add strengthening elements in the tanks (hereinafter “Strengthening Modifications”) (ex. G-5)

3. MINI subcontracted the cleaning, blasting, and painting of the barge to Pioneer Industries, Inc. (Pioneer) (ex. A-3). Once the subcontractor began the job of blasting the barge’s tanks, mill scale was found beneath the old layer of paint (ex. A-4).

4. Mill scale is “[a] black scale of magnetic oxide of iron formed on iron and steel when heated for rolling, forging, or other processing.” WEBSTER’ S THIRD NEW INTERNATIONAL DICTIONARY (1961), *s.v.* “mill scale.”

5. Chuck Savage was the Senior Estimator for Pioneer. Mr. Savage stated in his affidavit that he had 30 years of experience involving 15 naval vessels, but had never encountered mill scale on any of these vessels. Therefore, Mr. Savage stated that he did not anticipate mill scale, nor did he include the cost of its removal in his bid. Mr. Savage also admitted that he did not inspect the barge prior to bidding. He felt it was useless to try to inspect the inside of the tanks because the tanks are not generally gas free. Further, the mill scale was hidden beneath the paint. Appellant did not submit questions to the Government concerning the history of the barge or the presence of mill scale. (Ex. A-3)

6. According to respondent, if appellant had made a pre-bid inspection, it would have seen that a portion of the barge was painted in commercial colors that would have indicated it had not always been a vessel of the United States Navy. Further, appellant would have been allowed to scrape paint off to see the condition beneath the paint. (Ex. G-6) Employees of respondent with experience in ship maintenance stated in affidavits that they had encountered mill scale on other naval vessels during overhaul work in tanks and under paint (exs. G-1, -2, -4, -6). Appellant acknowledges at least one such instance (app. br. at 6). Accordingly, we find that the condition encountered by appellant was not commonplace but it does occur.

7. Pioneer reported to MINI that the contract took more time than originally planned, and was completed at a greater cost due to mill scale. On behalf of Pioneer, MINI requested a change order in the amount of \$17,597.40 by FAX of 10 August 1998. (R4, tab 11) This was rejected by letter dated 14 August 1998 (R4, tab 12).

8. Upon completion of the contract, MINI submitted a claim, certified on 2 October 1998, to the contracting officer for an equitable adjustment of \$166,580.32, the alleged additional cost of mill scale removal from the strengthening modifications (R4, tabs 19, 21). On 25 November 1998, the contracting officer issued a decision denying MINI's claim (R4, tab 23). This timely appeal followed on 31 December 1998 (R4, tab 24).

9. Both parties have provided affidavits concerning whether respondent's employee in charge of its small fleet of barges, Joseph Jett, knew about the existence of mill scale prior to award and failed to tell bidders. According to Mr. Savage and another employee of Pioneer, Dennis Welchert, Mr. Jett disclosed at a Wednesday production meeting that strengthening modifications to the barge's tanks had been accomplished and painted without removing mill scale. (Ex. A-3, -4) Mr. Jett denies any knowledge of mill scale on the barge and states the first he heard about the condition was at production meetings during contract performance (ex. G-5). Other employees of respondent assert they have never heard Mr. Jett make such a statement (ex. G-3, -6, -7). One of respondent's affiants, Dennis Rosvall, further asserts, and we find, that the strengthening modifications comprise no more than 12 percent of the total area of the tanks (ex. G-6).

DECISION

MINI argues that it was reasonable to assume that mill scale would not be present on a naval vessel in current inventory, that respondent had knowledge of the mill scale which it did not disclose, and that the situation encountered is tantamount to a differing site condition. MINI's logic is, in part, that the vessel should have been previously prepared for painting in accordance with Government regulations and all mill scale should have been removed prior to previous paintings. Respondent asserts, *inter alia*, that the contract is unambiguous in its requirement for removal of mill scale.

We agree that the contract is unambiguous in its requirement for removal of mill scale (finding 2). The presence of mill scale is not unprecedented in situations such as this (finding 6), and, in a fixed-price contract, appellant bears the risk of its assumption that there would be no mill scale. Moreover, appellant's "differing site condition" analogy is negated by the fact that the contract did not contain a "differing site conditions" clause (finding 1) which would have allocated risk between the parties. On these facts, appellant as a fixed-price contractor thus bears the risk of unanticipated costs of performance unless it can establish that respondent had information which it should have, but did not, disclose regarding the presence of mill scale. The contract is silent as to whether mill scale is present, so if respondent had superior knowledge and did not disclose it, appellant may be entitled to recover. *Helene Curtis Industries, Inc. v. United States*, 312 F.2d 774 (Ct. Cl. 1963). The burden of proof is on appellant. *Teledyne McCormick-Selph v. United States*, 588 F.2d 808 (Ct. Cl. 1978).

To prove superior knowledge, appellant must first establish that respondent possessed knowledge that mill scale was present. To do this, appellant has presented affidavits in which it is asserted that Mr. Jett knew that mill scale was present in the strengthening modifications. Mr. Jett denies this in an affidavit, and his denial is supported by affidavits from several of respondent's employees. The parties are thus at a stalemate on this crucial issue, and with the parties' waiver of an oral hearing we are left without the benefit of observation or cross-examination in resolving the conflict. We have, therefore, carefully reviewed the parties' positions for compelling logic or, conversely, detractions such as contradiction, exaggeration, or inconsistency. We have similarly reviewed the record to ascertain whether there is probative evidence to corroborate or discredit either party's position. We can find nothing persuasive to support or detract from the affidavits.* As the critical evidence on superior knowledge is evenly balanced based on the conflicting affidavits, appellant has failed to establish that it is more probable than not that Mr. Jett knew of the mill scale. Appellant has not met its burden of proof. *Cf. General Electric Co. v. American Wholesale Co.*, 235 F.2d 606 (7th Cir. 1956) (reversing the district court's grant of an injunction based on conflicting affidavits). The appeal is denied.

Dated: 27 November 2000

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

* We have found the strengthening modifications amounted to only 12 percent of the tanks (finding 9), but this goes to the extent of the mill scale, not to whether respondent possessed knowledge of the mill scale.

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 51942, Appeal of Marine Industries Northwest, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals