

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Shah Construction Company, Inc.) ASBCA No. 50411
)
Under Contract No. DACA21-94-C-0033)

APPEARANCES FOR THE APPELLANT: Leonard W. Childs, Jr., Esq.
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Engineer Trial Attorney
US Army Engineer District,
Savannah

OPINION BY ADMINISTRATIVE JUDGE DICUS

This appeal is taken from a contracting officer's final decision denying appellant's claim for an equitable adjustment of \$80,098.76. The underlying contract is for construction of concrete ammunition magazines (igloos) and related work at Fort Stewart, Georgia. Only entitlement is before us. We sustain the appeal.

FINDINGS OF FACT

1. In 1993, respondent issued Solicitation No. DACA21-93-B-0134 for the construction of ammunition igloos (R4, tab 4). The solicitation and the resulting contract (hereinafter referred to as "the contract") contained certain provisions as set out below.

2. The contract contained the SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984) clause at FAR 52.236-21 ("specifications and drawings clause"), which provides, in pertinent part:

(a) . . . Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or

mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. . . .

. . . .

(c) Where “as shown”, “as indicated”, “as detailed”, or words of similar import are used, it shall be understood that the reference is made to the drawings accompanying this contract unless stated otherwise.

(R4, tab 6E)

3. Specification section 02962, JUTE MATTING AND OPEN WEAVE FABRIC FOR EARTH DITCH AND SLOPE PROTECTION, states in relevant part:

1. DESCRIPTION OF WORK: This section covers the placement of jute matting in ditches and on slopes to prevent erosion, and the placement of open weave fabric on slopes to hold mulch, complete.

2. MATERIALS:

2.1 Open Weave Fabric and Staples: For securing mulch placed on slopes under SECTION: GRASSING - SEEDING FOR ROADWAY AND EMBANKMENTS IN OUTLYING AREAS, open weave fabric shall be used consisting of onion sacking, nonmetallic erosion net cloth or similar approved material. Mesh of the fabric may vary from approximately 1/4 inch to 4 inches in size. Staples shall be No. 9 or No. 10 wire and fabricated as shown.

2.2 Jute Matting and Staples: To prevent erosion in ditches and on slopes, jute matting shall be used as indicated. The jute matting shall be of open weave, single jute yarn averaging 190 pounds per spindle of 14,400 yards. . . .

. . . .

4. APPLYING OPEN WEAVE FABRIC ON MULCHED SLOPES: After sprigging, overseeding, and mulching have been completed in accordance with SECTION: GRASSING - SEEDING FOR ROADWAY AND EMBANKMENTS IN OUTLYING AREAS, open weave fabric shall be applied to the slopes as indicated. The

placement of the open weave fabric shall closely follow the mulching operations for each individual area. Strips of the fabric shall be overlapped 4 inches and held in place with staples spaced a maximum of 4 feet on centers. The outer perimeter of the fabric covering shall be held in place with staples spaced a maximum of 2 feet on centers. Staples shall be driven flush with the ground surface

5. JUTE EROSION CONTROL MATTING:

5.1 General: Jute erosion control matting in ditches and on slopes shall be constructed in the areas shown. . . .

. . . .

5.4 Bedding: After the matting is secured in place, the matting shall be firmly imbedded in the soil by tamping or rolling with approved smooth rollers. . . The matting shall be pressed firmly into the soil so that flow of water will be over matting. . . .

(R4, tab 6A)

4. Specification section 02221, EXCAVATION, FILLING AND BACKFILLING FOR BUILDINGS states, at subparagraph 3.14.2.1 “Placement Adjacent to Igloos:”

After the concrete arch and walls have been waterproofed and dampproofed as specified, earth cover shall be provided as indicated. . . .

(R4, tab 6D, ¶ 3.14.2.1)

5. The sedimentation and erosion control plan for the project is depicted in the drawings. Drawings P-17 and P-18 show the plan for the roadways whereas P-19 and P-20 show the plan for the ammunition igloos and the surrounding areas. The drawings each contain a legend. The legend shows symbols that depict “limit of seeding and mulching” and “disturbed area stabilization with permanent seeding” in the drawing. Drawing P-21 is a detail plan for the igloos. (R4, tab 7)

6. Drawings P-19 and P-20 depict what is labeled “EROSION CONTROL MAT” and contain a cross-hatching symbol for “EROSION CONTROL MAT” which covers the ten igloos (R4, tab 7).

7. Drawing P-21 depicts a cross section of an igloo's exterior details. In the middle of the drawing are the words "SLOPE PROTECTION." The drawing is a side detail of the earth mound over an igloo. Adjacent to the mound, and oriented to the mound by a straight-line arrow, are the words:

BACKFILL ONLY AFTER CONCRETE WALL AND ARCH
CONSTRUCTION IS COMPLETE AND CONCRETE HAS CURED A
MINIMUM OF 28 DAYS. COMPACT SOIL IN ACCORDANCE WITH
SECTION 02221 OF THE SPECIFICATIONS. BACKFILLING SHALL
BE COMPLETED SIMULTANEOUSLY ON EACH SIDE WITH A
DIFFERENCE IN HEIGHT NOT GREATER THAN 2' 0" FROM SIDE
TO SIDE.

(R4, tab 7)

8. Drawing P-21 depicts erosion control matting under four to six inches of topsoil on top of an igloo. The matting overlapped 2 inches at the edges and was secured by wooden stakes. A cross section titled "SLOPE PROTECTION," notes with an arrow drawn to the matting: "THREE DIMENSIONAL GEOMATRIX OF NYLON EROSION CONTROL MATTING (8.0 OZ/SQ. YD) 0.014 DIA. FILAMENTS HEAT BONDED WITH 23 CARBON BLACK BY WEIGHT." (R4, tab 7)

9. The Polote Corporation (Polote) decided to pursue a subcontract for site work. Polote's estimator reviewed specification section 02962 and the drawings regarding erosion control requirements. He noted that the drawings contained a detail that listed nylon matting. Specifically, the note on drawing P-21 called for nylon matting (finding 8) but specification section 02962 called for jute matting (finding 3). He considered this a conflict, so on the day before bid opening he consulted with Benjamin Polote, the company president. Mr. Polote resolved the perceived conflict by deciding to follow the specifications, which he believed from his years in the construction industry always took precedence over drawings. (Tr. 40-43, 56) He told the estimator to use a number, approximately \$5,000, to cover jute matting, with nothing for nylon matting (tr. 71, 89). There is no evidence that Polote or appellant sought clarification from respondent of the erosion control matting directions found on drawing P-21 prior to bidding.

10. On 7 January 1994, Shah Construction Company, Inc. entered into Contract No. DACA21-94-C-0033 with the United States Army Corps of Engineers, Savannah District, to expand the ammunition supply point at Fort Stewart, Georgia, for the firm fixed-price of \$3,538,400. The contract required the construction of ten igloos. (R4, tab 4) Shah had used the Polote bid in submittal of its bid price for the site work. Several months later, Shah subcontracted the work that is at issue here to Polote. (Affidavit of Anil C. Shah (Shah aff.); tr. 101)

11. On or about 13 June 1994, appellant submitted a proposal to the contracting officer's representative for approval to use jute matting to cover the ammunition igloos. The Government rejected the request for approval and directed appellant to use nylon matting on the igloos. (R4, tab 8) Nylon matting is significantly more expensive than jute matting (tr. 50-54).

12. Appellant, asserting that the Government modified the contract by insisting on the nylon matting, submitted a certified claim to the contracting officer in the amount of \$61,572.54 on 9 October 1995. After receiving additional information from Polote, appellant amended its claim by letter dated 14 November 1995 and increased the amount of its claim to \$80,098.76. (R4, tab 3) The contracting officer issued his decision denying the claim on 11 September 1996 (R4, tab 2). Appellant timely appealed the contracting officer's decision to the Board on 9 December 1996 (R4, tab 1).

13. Appellant has not produced Polote's or Shah's bid documents to support the estimate for the work at issue.

DECISION

Appellant contends that there was an irreconcilable conflict between drawing P-21 and the specifications, and that it was therefore proper for it to rely on the specifications as controlling. Appellant argues that the order of precedence in the specifications and drawings clause required it to rely on the specifications. Respondent contends there is no conflict and that appellant has not met its burden of proof.

Mr. Polote perceived a conflict between the specifications, which called for jute erosion control matting, and drawing P-21, which called for nylon erosion control matting. He did not consider the conflict as to where and how the matting was to be placed, *i.e.*, under the topsoil, secured by wooden stakes (drawing P-21) or on top of the topsoil, secured by staples (specification section 02962) (findings 3, 8, 9). We do not believe that, in failing to consider those provisions, Mr. Polote somehow missed an opportunity to resolve the matter. To the contrary, we believe that consideration of those provisions would only have reinforced the conflict. In any event, the conclusion that there was a conflict as to the type of matting - nylon versus jute - is inescapable. While Mr. Polote did not specifically state he relied on the order of precedence in the specifications and drawings clause, he testified that his experience in the industry had taught him to resolve such conflicts by resort to the specifications.

Respondent argues that contract provisions should be construed as in conflict only when no other reasonable interpretation is possible (resp. br. at 8). While we agree, we disagree as to the effect of that rule here. In our view, there is no conflict if the order of precedence in the specifications and drawings clause is included in the interpretation process. It is appellant's right "to take the Government sponsored order of precedence

clause at face value.” *Franchi Construction Company v. United States*, 609 F.2d 984, 990 (Ct. Cl. 1979). The result here is that the order of precedence clause resolved the conflict in favor of jute matting. *Hensel Phelps Construction Co. v. United States*, 886 F.2d 1296 (Fed. Cir. 1989).

Respondent argues that one only looks to an order of precedence clause “to resolve inconsistencies between specific terms in competing clauses of like provision.” (Resp. br. at 6). Respondent cites *Apollo Sheet Metal, Inc. v. United States*, 44 Fed. Cl. 210 (1999), which declined to apply an order of precedence clause to resolve a conflict between design and performance specifications. Were we inclined to follow the holding in that case, we do not believe it would work to respondent’s advantage under the facts at issue here. We believe the conflict identified by appellant involves specific terms (the fabric of erosion control matting) in competing clauses (nylon and jute) of like provision (the means to prevent erosion on slopes). Moreover, it would have been a simple matter for respondent to include an exception for the igloos in specification section 02962.

Respondent also argues that neither Shah nor Polote have shown they relied on the interpretation requiring jute. We have found to the contrary. Furthermore reliance need not be established where, as here, the order of precedence clause resolves the conflict and the rule of *contra proferentem* is not invoked. *Fossitt Groundwork, Inc.*, ASBCA No. 45356, 96-1 BCA ¶ 28,096; *Roberts Construction Company*, ASBCA No. 32171, 86-2 BCA ¶ 18,981. Moreover, we cannot find that Polote overreached. The testimony satisfactorily established that Mr. Polote and his estimator saw a conflict and resolved it by resort to contract provisions drafted by the Government. We cannot, on this record, find that appellant will somehow recover more than its costs and a reasonable profit if we sustain the appeal. Moreover, the fact that only entitlement is at issue and appellant must still prove its additional costs here gives respondent an additional layer of protection from overreaching. *Fossitt Groundwork, supra*. We sustain the appeal.

Dated: 8 March 2001

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

I concur

I concur

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

EUNICE W. THOMAS
Administrative Judge
Acting 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. 50411, Appeal of Shah Construction Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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