

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Alaska Mechanical, Inc.) ASBCA No. 50988
)
Under Contract No. F65501-96-C-0027)

APPEARANCE FOR THE APPELLANT: Walter H. Garretson, Esq.
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Anchorage, AK

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
MAJ David L. Frishberg, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE MOED

This appeal relates to a contract to furnish and install new boiler feed pumps at a military installation. The contracting officer interpreted the contract as including the furnishing and installation of certain wiring and directed appellant (hereinafter "AMI") to perform that work. While disagreeing with the interpretation, AMI complied therewith and thereafter submitted a claim for a price increase for the work on the ground that the direction was a constructive change. The claim was denied, resulting in this appeal. Prior to the hearing, we denied the Government's motion for summary judgment. 98-2 BCA ¶ 29,777. At this juncture, only entitlement is to be decided.

FINDINGS OF FACT

1. This appeal relates to a construction-type contract for replacement of four boiler feed pumps in the boiler plant at Elmendorf Air Force Base, Alaska. The contract was awarded to AMI on 19 August 1996, through sealed bidding, at the firm-fixed price of \$267,800.00. Among the standard clauses included in the contract were: FAR 52.236-3 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984); FAR 52.236-21 SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984); and FAR 52.243-1 CHANGES-FIXED-PRICE (AUG 1987).

2. The entire contract work was described in § 01010.1 ("PROJECT SCOPE") of the specifications, in part, as follows:

The work included under this project consists of the following major items. This listing does not comprise the entire project

scope and is intended only to list major portions of the work. The work includes repair by replacement of four (4) each boiler feed pumps & support stands. The Contractor has the option to retain and reinstall existing 300 HP electric motors or provide new pump/motor assemblies to replace existing [sic]. *Provide new wiring and connections.*

(Emphasis supplied) § 01010.29.1 of the specifications states that “[w]herever the word ‘provide’ is used it shall mean ‘furnish and install complete and ready for use.’”

3. The only reference in the contract to new wiring is contained in § 01010.1.1, as follows:

The end result of this project will be a complete and usable system maintaining the current operating scheme. . . . Work will include connection of all ancillary piping, valves, gauges, etc. and *electrical appurtenances* for a complete and operable system. . . . *New electrical power wiring from the pump motors to the motor controllers shall consist of three (3) 750 KCMil Type XHHW copper and one (1) #2 Type XHHW copper for ground.*

(Emphasis supplied).

4. Section 01010 of the contract specifications contained several references to a non-existent Division 16 (*e.g.*, §§ 01010.1.29.21.1, 01010.30.1). The Corps of Engineers guide specification for construction, which had been used in preparing the specifications for this contract, contains a Division 16 which is devoted to electrical work. Division 16 was omitted from the contract specifications as unnecessary in view of the small amount of electrical work involved in the project. Instead, the needed provisions were included in § 01010, as set forth above (findings 2, 3). (Tr. 2/54) The drafter of the contract specification failed, however, to delete all of the references to Division 16 found in § 01010 of the guide specification (tr. 2/39). AMI discovered these mistaken references to Division 16 during review of the solicitation and inquired of the contracting officer concerning the matter. The contracting officer responded by issuing Addendum No. 1, as part of Amendment 003 to the solicitation, advising prospective bidders that “[t]here is no Division [sic] 16” (R4, tab 4).

5. The solicitation and ensuing contract did not contain separate electrical drawings. The data in the drawings relating to electrical work, which was contained in mechanical drawing M-1, consisted solely of notes designating the distribution centers and transformers serving the four new feed pumps. The drawings did not depict the electrical wiring for that service.

6. In preparing its bid, AMI applied an interpretation that “there [was] no new electrical or control wiring required [under the contract] . . . with the exception of disconnecting and reconnecting the power wiring on the existing 300 HP motors” (supp. R4, tab 1). AMI derived that interpretation from the following circumstances: (a) the omission of Division 16 from the specification (finding 4); (b) the lack of details in the drawings concerning new electrical wiring (finding 5); and (c) the absence of a direction in § 01010.1.1 to “supply, install, provide, replace or [accomplish]” (tr. 1/47, 79) the “[n]ew electrical power wiring from the pump motors to the motor controllers” referred to therein (finding 3).

7. Another indication to AMI that new wiring was not part of its contract work was the omission of submittals relating to electrical work from the Schedule of Material Submittals in the contract. There is nothing in the record, however, indicating that submittals are required with respect to all work provided for in the contract.

8. In keeping with the foregoing interpretation, AMI did not solicit any quotes, or include any amount in its bid, for the electrical wiring work contained in § 01010.1. It did not inform the contracting officer of the foregoing interpretation prior to submittal of its bid for the contract.

9. Messrs. Doug Barce and Ed Horrocks, made a pre-bid visit to the work site on behalf of AMI. Mr. Barce, whose specialty was mechanical systems, knew very little about electrical work. Mr. Ed Horrocks was AMI’s chief estimator and was in charge of preparing AMI’s bid for this contract. The escorts furnished by the contracting officer for the visit were Mr. Steven J. Frere, a Government engineer familiar with the existing boiler feed pump installation, and Mr. John Dalsfoist, a mechanical engineer employed by the Government, who had drafted the contract specification. The AMI representatives did not ask questions, or initiate any discussion, concerning the work either during or after the visit.

10. The Government first learned of AMI’s above contract interpretation after award of the contract. On or about 23 January 1997, AMI began demolition of the first of the four existing feed pumps, preparatory to removal and replacement. In the course of that work, AMI found that a portion of the existing power wiring being disconnected from the pump had become deteriorated. When informed of that condition, the on-site Government representatives asserted that AMI was required to replace that wiring as part of the contract work (tr. 2/55; R4, tab 7).

11. AMI disagreed with that position on the basis of its above interpretation of the contract (finding 6) and asked that the matter be referred to the contracting officer, Ms. Lucretia A. Teitzel. By letter of 6 February 1997, she responded that AMI was required by the contract to “supply the wiring described in Section 01010, Page 1, Paragraph 1.1.” (R4, tab 7). That response was repeated in the form of a written direction from the

contracting officer to AMI, dated 21 February 1997, (R4, tab 9). On 25 February 1997, AMI notified the contracting officer that it would comply with the direction but considered the same to be a change order (R4, tab 10).

12. In the decision on the Government's motion for summary judgment, we held that there were material issues for trial based on evidence that the work actually demanded of, and accomplished by, AMI differed from that referred to in the specifications in that the new wiring was installed from the pump motors to the distribution center rather than to the motor controllers which was the destination identified in § 01010.1. On that basis we held that there was a genuine issue of material fact for trial. 98-2 BCA at 147,555. At the hearing, however, there was undisputed testimony from Mr. John M. Girard, who devised the above provisions for insertion into § 01010.1 and who qualified as an expert in electrical engineering, that "[t]he power wiring runs from the motor controller which resides within the distribution center through conduit . . . to the motor" (tr. 2/114). On that basis, there was no difference in substance between the work directed and that performed.

13. AMI subsequently submitted a claim in the amount of \$21,863.00 for the work performed pursuant to the contracting officer's direction. The claim was denied by the contracting officer in a written decision, dated 22 July 1997, conforming to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. A timely appeal from that decision was taken and docketed as ASBCA No. 50988.

DECISION

AMI is mistaken in asserting that there was no contract requirement to furnish and install the "[n]ew electrical power wiring from the pump motors to the motor controllers" set forth in § 01010.1.1 (finding 3). Section 01010.1 required AMI to "[p]rovide new wiring and connections" (finding 2). That provision necessarily referred to the "[n]ew electrical power wiring from the pump motors to the motor controllers," set forth in § 01010.1.1, which was the only "new wiring" requirement in the contract (finding 3). AMI was required to furnish and install that wiring by virtue of § 01010.29.1 of the specifications which defined the term "provide," wherever used in the specifications, as meaning "furnish and install complete and ready for use" (finding 2).

We are not required to determine whether AMI's interpretation was reasonable (finding 6). Even if it was such, it conflicted with §§ 01010.1 and 01010.1.1 which plainly required AMI to furnish and install new power wiring between the pump motors and the motor controllers (findings 2, 3). That patent ambiguity would have made it obligatory for AMI to check with the contracting officer prior to relying on that interpretation in bidding on the contract. *T. Brown Constructors, Inc. v. Pena*, 132 F.3d 724, 731 (Fed. Cir. 1997). Had it done so, it would have learned of the contracting officer's reasonable interpretation that said wiring was part of the contract work. AMI failed to take that action (finding 8). As a consequence, AMI was bound by the contracting officer's interpretation in performing the

ensuing contract, without regard to the reasonableness of its own interpretation. *Master Mechanical Contractors, Inc.*, ASBCA No. 33304, 87-2 BCA ¶ 19,799.

CONCLUSION

For the reasons stated above, AMI is not entitled to recover on its claim. The appeal is, therefore, denied in all respects.

Dated: 23 January 2001

PENIEL MOED
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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. 50988, Appeal of Alaska Mechanical, Inc., rendered in conformance with the Board's Charter.

Dated:

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