

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
RQ Construction, Inc.) ASBCA No. 52376
)
Under Contract No. N68711-94-C-1499)

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OPINION BY ADMINISTRATIVE JUDGE DICUS
ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This appeal was taken from a contracting officer's decision denying the \$548,233 claim of RQ Construction, Inc. ("RQ" or appellant). The claim seeks additional costs for supply and installation of metric concrete blocks. The underlying contract was for construction of an operations and logistics facility at the Naval Amphibious Base, Coronado, California. The parties have filed cross motions for summary judgment, asserting that no material facts are in dispute. We deny appellant's motion and grant the Navy's motion.

FINDINGS OF FACT

The following findings are solely for the purpose of resolving the motions.

1. A memorandum dated 21 June 1994 from the Naval Facilities Engineering Command approved a policy for use of metric construction projects in FY 1997. The memorandum referred to Exec. Order No. 12770, July 25, 1991, which directed agency heads to use the metric system in Federal procurement. (Navy cross mot., attach. 13, 14)

2. In May 1995, Navy representatives met with concrete block manufacturers and informed them of the Navy's intention to use metric concrete block in all FY 1997 projects. Two California manufacturers stated they would produce the metric block for FY 1997 projects and future projects. However, after passage of the Savings in Construction Act of 1996, Pub. L. No. 104-289 ("SCA"), on 11 October 1996, which permitted use of non-

metric block and applied to contracts and solicitations issued after its effective date of 9 January 1997, the California manufacturers informed the Navy that they would not provide metric block. A Navy representative thereafter conducted additional research and was informed by Superlite Block Co. of Arizona (Superlite) that it could produce metric concrete block to satisfy the Navy's FY 1997 needs. (R4, tab 45; Navy cross mot., attach. 1; (Navy's proposed undisputed facts (NUF), ¶¶ 9, 10))¹

3. Solicitation No. N68711-94-B-1499 was issued by the Naval Facilities Engineering Command, San Diego, California on 20 November 1996. The solicitation called for construction of a masonry building with concrete blocks nominally sized at 200mm and 300mm. (R4, tab 2 at 19, 97, 353)²

4. By letter of 11 December 1996, R. A. Burch Construction Co., Inc., sent the contracting officer excerpts from the Congressional Record and other materials advocating "soft metric" conversion (R4, tab 4). Appellant asserts, and we accept for purposes of these motions, that soft metric conversion refers to materials manufactured in inches and feet and converted to metric measurements for reference (App. mot. at 1, n. 1). New policy guidance was issued by the Navy as a result of the SCA which provided that for projects advertised for construction prior to 8 January 1997 non-metric block could be substituted in metric designs so long as the non-metric materials were dimensionally compatible with the rest of the design (Navy cross mot., attach. 1).

5. Amendment No. 2 to the solicitation was issued on 16 December 1996, extending the bid opening date to 9 January 1997. The amendment provided: "The contractor may substitute non-metric materials for those indicated as metric materials. At no cost to the Government, the contractor shall provide any engineering or design effort to adjust dimensions and demonstrate the adequacy of materials to comply with the original design." (R4, tab 2 at 13)

6. The amendment was received by RQ and read by its president, Thomas Quinn. He understood that, upon issuance of the amendment, the plans and specifications did not call for "hard metrics," or materials manufactured to whole metric proportions.³ RQ did not, prior to bidding, attempt to ascertain prices or locate domestic suppliers of metric block. His perception was "if the government specified it, that it was readily available." RQ's masonry subcontractor, Robertson Masonry, Inc. (Robertson), also failed to price or contact suppliers for metric block. Prior to bidding, RQ did not attempt to evaluate:

i) the scope of the engineering effort associated with use of non-metric block pursuant to Amendment No. 2;

ii) the cost of any redesign or engineering effort associated with use of non-metric block pursuant to Amendment No. 2;

iii) schedule implications associated with any redesign or engineering implications arising from use of non-metric block. (Navy cross mot., attach. 2 at 18-19, 23-25; attach. 5 at 28-29)

7. RQ submitted the low bid of \$6,309,630. By letter of 15 January 1997 it confirmed its bid and stated the performance period of 365 days was understood and would be met. The contract was awarded to RQ on 30 January 1997. (NUF, ¶¶ 18, 19, 22) Relevant clauses referenced in the contract included FAR 52.233-1 DISPUTES (OCT 1995) - ALTERNATE I (MAR 1994); FAR 52.243-4 CHANGES (AUG 1987). Included in full text was FAC 5252.201-9300, CONTRACTING OFFICER AUTHORITY (JUN 1994), which stated, *inter alia*, that only a contracting officer can bind the Government and required the contractor to make inquiry of the contracting officer before acting on the direction of another Government employee. (R4, tab 2 at 52, 74)

8. RQ entered into a subcontract with Robertson on 11 February 1997. Robertson listed Orco Block as a supplier in the amount of \$110,000. The prices were not for hard metric block. (NUF, ¶¶ 24, 25)

9. Prior to assembling submittals, Robertson concluded that non-metric block available from local companies was not going to work with the metric specifications of the project because it would have to be cut and the cuts would distort the architectural configuration of the building⁴ (NUF, ¶ 26; Navy cross mot., attach. 5 at 15). Robertson had assumed that either metric or non-metric block could be used, and when it became clear the non-metric block available from local suppliers would not work, calls were made to attempt to find metric block (NUF, ¶ 28).

10. A meeting was held between the parties on 27 March 1997 (NUF, ¶ 29). Either at the meeting or near the time of the meeting the Navy provided RQ with a list of potential suppliers of metric materials (NUF, ¶ 30). As the result of calling companies on the list RQ was referred to Superlite (NUF, ¶31). Superlite sent Robertson a quotation for metric block at a total price of \$152,587 with a delivery date of 28 July 1997 (R4, tab 9; NUF, ¶ 32).

11. Lt. J.G. Richard Hayes was the Assistant Resident Officer in Charge of Construction for the Navy. He did not have authority to direct changes to the contract (NUF, ¶ 33). On 5 May 1997, RQ had a telephone conversation with Lt. Hayes. RQ told him there was a 15 week lead-time associated with ordering the metric block from Superlite and asked if an order should be placed. Lt. Hayes told RQ to order the block. (NUF, ¶ 36; Navy cross mot., attach. 4, ¶ 6) He also told RQ it could pursue an equitable adjustment if it believed it was entitled to one (NUF, ¶ 38).

12. Citing the SCA, RQ protested the direction to use metric block by letter of 8 May 1997 addressed to "ROICC, Coronado Field Team . . . Attn. LT. J.G. Richard Hayes." The letter reserved the right to make a claim and asked for the name and phone number of the designated construction metrication ombudsman (R4, tab 14). The Navy responded by letter of 27 May 1997 signed by Lt. Hayes. The letter provided the name and telephone number of the ombudsman, cited the option in Amendment No. 2 (finding 5), and stated:

If your bid was not based upon metric block as specified, then a credit for the non-metric block and all the required engineering, design effort, and labor to adjust the dimensions of the non-metric block to comply with the original design is expected.

(R4, tab 16)

13. On or about 13 May 1997, RQ submitted Request for Information (RFI) No. 32, requesting approval to use non-metric block below grade to allow the project to move forward. RQ amended its approach on 15 May 1997 by proposing slab on grade in lieu of concrete block. (Appellant's Undisputed Facts (AUF), ¶ 53). This was ultimately approved by the Navy and a contract amendment was issued on 12 November 1997 which added \$4,315 to the contract price (AUF, ¶ 56).

14. On 22 May 1997, Robertson sent a signed purchase order confirmation to Superlite. Superlite estimated delivery on 3 September 1997. (AUF, ¶ 59)

15. A meeting between the parties was held on 15 July 1997 at which the metric block issue was covered (NUF, ¶ 40). The meeting minutes include the following:

2. METRIC BLOCK STATUS

Delivery expected week of 9/1/97. RQ to submit request for equitable adjustment for what costs they feel are associated with metric block. CDR Giorgione/ Tom Quinn [sic] discussed each of their positions at this time. Mod will be issued to get contract current in regards to time. Delay Issue #1 (Building Pad Not Available) and Delay Issue # 3 (Metric Block) will be covered. An ending date for Delay Issue #3 was agreed for 9/5/97. Time associated with Delay Issue #2 (AT&T Phone Conduit) is included with this mod as it runs concurrent with Delay Issue #3. The costs associated with Delay Issue #2 and #3 still need to be negotiated. LT Hayes and Mike Patterson [of RQ] to review schedule and determine exact number of days required.

(R4, tab 20)

16. Superlite's delivery of the metric block commenced on 5 September 1997 (AUF, ¶ 71). Not all of the block ordered by Robertson was available, however, and Robertson had to hand-cut many blocks with a special saw (app. supp. reply, ex. B).

17. Modification No. A00006 (Mod 6) was executed by RQ on 1 October 1997 and by the Navy on 6 October 1997. Mod 6 extended the contract performance period by 128 days to 21 June 1998 and specifically excluded "any potential related costs that the contractor and the government has [sic] yet to address." (R4, tab 3 at 1074-75)

18. On 9 October 1997, RQ submitted a request for equitable adjustment (REA) in the amount of \$463,014 and an 84-day extension (AUF, ¶¶ 73, 75, 76). A revised REA was sent to the Navy on 7 January 1998, seeking additional costs of \$640,046 and a 173 day extension (AUF, ¶ 80). By letter of 17 February 1998, the Government denied the REA (AUF, ¶ 82). The letter provided:

1. The "Savings In Construction Act of 1996" does not appear to be applicable to this contract due to the fact that the solicitation was issued prior to the effective date of this Act.
2. The plans and specifications are clear in their requirement for metric materials. Although Amendment 0002 allows substitutions of non-metric materials, the Government is unaware of any effort made by you to provide the required engineering to adjust the dimensions or to demonstrate the adequacy of these materials to comply with the original design. Failing to demonstrate that non-metric block could comply with the original design left you with the only option of providing the metric block as specified.
3. Metric block is available as a "commercial item" as demonstrated by Superlite.

(R4, tab 28)

19. After further communications came to naught, RQ submitted a certified claim on 12 November 1998, seeking a 138-day extension and additional costs of \$548,233. A contracting officer's decision denying the claim was issued on 14 July 1999. (AUF, ¶¶ 84-89) An undated notice of appeal was filed and received by the Board on 20 September 1999.

DECISION

SUMMARY JUDGMENT

Summary judgment is appropriate under FED. R. CIV. P. 56, which we look to for guidance, where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Inferences must be drawn in favor of the party opposing summary judgment. *Hughes Aircraft Co.*, ASBCA No. 30144, 90-2 BCA ¶ 22,847. In deciding a motion for summary judgment, we are not to resolve factual disputes, but to ascertain whether material disputes of fact are present. *General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851. This principle also applies in the case of cross motions for summary judgment. *Town of Port Deposit v. United States*, 21 Cl. Ct. 204, 208 (1990). However, on cross motions “counsel are deemed to represent that all relevant facts are before the [Board] and a trial is unnecessary.” *Aydin Corp. v. United States*, 669 F.2d 681, 689 (Ct. Cl. 1982). This appeal is before us on cross motions.

Appellant’s Motion

RQ argues in its motion that the Navy required use of hard metric block in violation of the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, 108 Stat. 3243 (1994), the Metric Conversion Act of 1975, 15 U.S.C. 205c, (MCA), and the FAR. It also argues the contract resulted from a mutual mistake. RQ, as proponent of the claim, bears the burden of proof at trial. *Sphinx International Inc.*, ASBCA No. 38784, 90-3 BCA ¶ 22,952. Where as here the movant has the burden of proof his showing must be sufficient that no reasonable trier of fact could find other than for the movant. *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986), citing W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Issues of Material Fact*, 99 FRD 465, 487-88 (1984). We find RQ has failed to make the necessary showing, as explained below. Arguments raised by appellant in opposing the Navy’s cross motion are addressed in the section dealing with the cross motion.

According to RQ, FASA at 10 U.S.C. § 2377(b)(2) required the Navy to use concrete block that was commercially available, and hard metric block was not commercially available. A similar argument is made with respect to the MCA, which excepts use of metric materials where it is impractical or likely to cause significant inefficiencies. 15 U.S.C. § 205(b)(2). We do not address the commercial availability of metric block, as we hold that metric block was not required.

RQ’s argument that the Navy violated FASA, MCA and the FAR provisions implementing those statutes requires establishment of the factual predicate that the Navy required hard metric block. That factual predicate cannot be established because of

Amendment No. 2 to the solicitation, which provided the option of using non-metric block. There is no dispute of fact as to whether the Navy issued and RQ received Amendment No. 2. As we interpret Amendment No. 2 (finding 5), it created an option which did not require use of metric block. Indeed, RQ's president interpreted Amendment No. 2 as not requiring hard metric block (finding 6). Accordingly, we hold that the contract, properly interpreted, did not impose the requirement of using metric concrete block.

RQ asserts that both parties were mistaken as to whether metric block was a commercial item under the FASA definition. While the Navy argues, and may have believed, that the availability of the block from Superlite made it a commercial item for purposes of FASA and its implementation by the FAR, there is no dispute about what the Navy knew prior to contract award. It knew that local suppliers would not provide metric block, but that Superlite would provide metric block (finding 2). Superlite did provide the block (finding 16). It is our view that the commercial item issue presents a question of statutory and regulatory interpretation, not a question of fact. To find a mutual mistake, both parties must be mistaken about a matter of fact. *Atlas Corp. v. United States*, 895 F.2d 745, 750 (Fed. Cir.), *cert. denied*, 498 U.S. 811 (1990). Accordingly, it is immaterial whether the Navy's interpretation of the FASA or FAR definition of "commercial item" encompassed the metric block supplied by Superlite. On this record, there was no mistake on the Navy's part as to the essential fact that Superlite, the ultimate supplier of metric block, was the only identified source. Thus, there was no mutual mistake of fact. Appellant's motion is denied.

The Navy's Cross Motion

The Navy argues that RQ did not conduct any investigation of the cost or availability of metric block and did not consider the cost of the engineering analysis that was required if non-metric block was used, thereby assuming the risk of performance. It also argues that RQ's motion must fail. According to the Navy, it is therefore entitled to judgment as a matter of law.

We have denied RQ's motion. We have also found it undisputed that RQ and Robertson did not price metric block before bidding (they did not contact masonry suppliers at all prior to award) and did not consider the engineering effort involved with use of non-metric block (finding 6). RQ does not argue that performance was impossible or commercially impracticable. We are therefore left with the question of whether RQ's inaction before bidding entitles the Navy to judgment as a matter of law. RQ has asserted a number of arguments against the granting of the Navy's cross motion.

Among appellant's arguments is the contention that it is entitled to reformation of the contract because it made a mistake in its bid. Appellant cites, *inter alia*, *United States v. Hamilton Enterprises, Inc.*, 711 F.2d 1038 (Fed. Cir. 1983),⁵ and *Ruggiero v. United States*, 420 F.2d 709 (Ct. Cl. 1970). The crux of the argument is that the contracting

officer's bid verification was inadequate. Assuming, *arguendo*, that this is undisputed, RQ has only overcome the first hurdle.⁶ In order to obtain the remedy of reformation from a unilateral mistake in bid, the contractor must also establish that the mistake was a clear cut clerical or arithmetic error, or a misreading of the specifications. The contractor must also establish by clear and convincing evidence what its bid would have been but for the mistake. *Hamilton Enterprises*, at 1046. Mistakes of judgment are not a basis for relief. *Id.* at 1048. RQ has failed to establish what its bid would have been, and it is undisputed that neither RQ nor its subcontractor made inquiries related to metric block or, alternatively, determined the effort involved in using non-metric block. These failures were the result of poor business judgment. RQ's arguments on unilateral mistake in bid are without merit.

RQ asserts that the Navy violated its duty to cooperate when it did not make vital information available. The information had to do with the availability of metric block. RQ's argument must fail because that information was available from other sources and was, eventually, obtained from those sources. Where information is obtainable from other sources the Government can reasonably expect a contractor to seek that information and is under no duty to volunteer information from its files. *H. N. Bailey & Associates v. United States*, 449 F.2d 376 (Ct. Cl. 1971). It is undisputed that the Navy here obtained its pre-award information by doing additional research, which included contacting Superlite, the ultimate metric block supplier. Moreover, it is undisputed that RQ obtained the name of Superlite, but *post-award*, through telephone calls to other suppliers (finding 10). It is, therefore, undisputed that the information was available from sources other than the Navy. RQ's argument is without merit.

We now address the Navy's principal argument. As stated above, it is undisputed that RQ did nothing prior to award to ascertain the availability or cost of metric block. It is similarly undisputed that it did nothing to ascertain the effort and cost associated with using non-metric block pursuant to the option in Amendment No. 2. The burden of determining availability is on the contractor and unexpected costs incurred when the product proves to be unavailable are to be borne by the contractor. *WRB Corporation v. United States*, 183 Ct. Cl. 409, 511-12 (Ct. Cl. 1968). We have held in denying an appeal in similar circumstances "absent impossibility or commercial impracticability of producing the specified materials, or an express representation as to availability in the contract, neither of which are shown to be present here, the risk of availability is on the contractor, and should be determined by the contractor before bidding." *ACS Construction Co. Inc.*, ASBCA No. 33832, 87-3 BCA ¶ 20,138 at 101,937, *aff'd*, 848 F.2d 1245 (Fed. Cir. 1988) (table). As in *ACS*, appellant has not shown, indeed, has not even argued, impossibility or commercial impracticability, or the existence of an express representation as to availability. Accordingly, we grant the Navy's cross motion. The appeal is denied.

Dated: 24 October 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
Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

¹ Where we have relied on a party's statement of undisputed facts, the opposing party does not dispute the proposed finding.

² The pages of the Rule 4 file are Bates-stamped. Where appropriate, the page number (without the multiple zero prefix) will be provided.

³ App. mot. at 1, n. 1.

⁴ Ironically, metric blocks had to be hand-cut. *See* finding 16, *infra*.

⁵ The Federal Circuit has recently issued an opinion characterizing *Hamilton* as “a narrow exception to the rule that contractors are barred from obtaining equitable relief when mistakes in their bids arise from other than ‘a clear cut clerical or arithmetical error, or a misreading of the specifications.’” *Giesler v. United States*, 232 F.3d 864, 872 (Fed. Cir. 2000).

⁶ In *Hamilton Enterprises* the Court denied relief for an alleged mistake in bid while finding that bid verification was inadequate.

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. 52376, Appeal of RQ Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

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