

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Fire Security Systems, Inc. ) ASBCA No. 53498  
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Under Contract No. N62467-99-C-1017 )

APPEARANCE FOR THE APPELLANT: Terrence M. O'Connor, Esq.  
Alexandria, VA

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.  
Navy Chief Trial Attorney  
Wilson J. Campbell, Esq.  
Trial Attorney  
Engineering Field Activity  
Chesapeake  
Litigation Headquarters  
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE MOED  
PURSUANT TO RULE 12.3

The parties entered into a bilateral contract modification changing the design of the sprinkler system being constructed under the contract and agreeing to a reduction of the contract price by reason of the deletion of certain work. The Government contends that certain original contract work, rendered unnecessary by the design change, was not taken into account in the agreed price reduction and, accordingly, seeks an additional price reduction therefor. Appellant, Fire Security Systems, Inc. (FSS) contends that the work in question came within the scope of the agreed price reduction. FSS has elected to proceed pursuant to the accelerated procedure in Board Rule 12.3. This decision relates only to entitlement.

FINDINGS OF FACT

1. This appeal involves two successive firm, fixed price construction-type contracts awarded to FSS for the installation of a fire protection sprinkler system, fire alarm, and related work in Buildings 705 and 711. These buildings were utilized as bachelor enlisted quarters at the Naval Support Activity, New Orleans, Louisiana. Both contracts were awarded and administered by the Naval Facilities Engineering Command, Southern Division Field Office New Orleans (hereinafter "the Navy").

2. The first contract, No. N62467-98-C-0925 (Contract No. 1), was awarded to FSS on 4 September 1998. Soon after the award, FSS devised several changes which it considered to be a “better way to design the entire sprinkler system” (tr. 156). The first of these changes (Change No. 1) was the replacement of the two fire sprinkler mains, required by the contract drawings for each of the three floors of the buildings, with a single center sprinkler main for each floor. The second design modification devised by FSS (Change No. 2) was to change the fire sprinkler design criteria set forth on the contract drawings from “light hazard” type of hazard occupancy to residential sprinklering as provided in National Fire Protection Association (NFPA) Standard 2-5.1.6 (R4, tab 5).

3. The third design change devised by FSS (Change No. 3) related to the vertical fire system risers used for conveying water to the sprinkler mains on each floor. Under the scheme shown on the contract drawings, the risers which were three stories high, were installed on the outsides of the buildings. At each floor, piping from the risers at each floor would penetrate the building walls and connect to the sprinkler main. (Drawings FP 101, FP 301 (Details 1, 6), FP 201, 202)

4. Under the design change devised by FSS, the vertical fire system riser for Building 705 would be located outside the building for the first floor, penetrating the building wall into the mechanical room for that floor and then ascending into the mechanical rooms of the second and third floors, connecting at each floor to the center sprinkler mains (tr. 201, 205). In the case of Building 711, the design change called for the vertical fire system riser to be located entirely inside the building. The water for the sprinklers in Building 711 would be brought into the building by an underground pipe entering the building in the first floor mechanical room (tr. 178). There, the pipe would be connected to a vertical fire system riser ascending to the upper floor mechanical rooms, connected at each floor to the center sprinkler mains. (Tr. 162, 207)

5. Relocating the vertical fire system riser wholly or partly inside the mechanical rooms of the buildings, which were heated (tr. 164), made it unnecessary to construct enclosures for the externally-installed risers required by the contract drawings. These enclosures, identified as “new pipe enclosures” on the drawings (Drawings A-202, -301, -401, -402) and also referred to in the record as “valve housing enclosures” (VHE), were intended to protect the risers from outdoor conditions, particularly, cold temperatures (tr. 164). This is delineated in § 13930 (WET-PIPE FIRE SUPPRESSION SPRINKLERS), ¶2.6 (HEATED ENCLOSURE) of the contract specifications requiring FFS to “[p]rovide an insulated/heated enclosure for the backflow preventer and associated piping above grade . . . [which] shall protect all portions of wet piping above grade to maintain a minimum of 40 degrees F.” The fourth change devised by FSS (Change No. 4), resulting from the relocation of the risers, was the deletion of the entire VHE for Building 711 and deletion of the second and third floor portions of the VHE for Building 705. (R4, tab 1)

6. Ms. Natalie C. Seiling, an Assistant Resident Engineer in Charge of Construction (AREICC), served as the Navy's project manager for the contract (tr. 66). She testified that, during Contract No. 1, FSS had proposed, and she had agreed to Changes Nos. 1 and 2 (tr. 66). She testified that prior to the second contract, she had no understanding that additional changes had been proposed by FSS (tr. 251).

7. Mr. Ray Hayes, president of FSS, testified that the VHE's were discussed with Ms. Seiling and other Government personnel during the course of Contract No. 1 (tr. 165). The content of those discussions, however, is absent from the record. Both Mr. Hayes and Mr. Gerald B. Dolan, the project manager for FSS, testified that shop drawings showing these changes had been submitted and approved under Contract No. 1 (tr. 168, 196). Documentary evidence evidencing those actions was not provided for the record (tr. 196). The testimony was based, instead, on the surmise that the work under Contract No. 1 involving these changes (tr. 198-99) would not have been undertaken by FSS without Government-approved drawings (tr. 168, 196). On the foregoing record, we cannot find that Change Nos. 3 and 4 were proposed, disclosed, or agreed to by the Navy during Contract No. 1.

8. On 20 April 1999, the contracting officer stopped work under Contract No. 1 because the unexpended funds under the contract were needed for repair of damage to Government facilities caused by Hurricane "George[s]" (tr. 65-66). That storm struck the Mississippi Gulf Coast area on 28-29 September 1998 (*Bye Georges*, NEW ORLEANS TIMES-PICAYUNE, SEP. 29, 1998, at A16, LEXIS News Library, NOTPIC File). On 2 September 1999, the parties entered into Modification No. P00004 to Contract No. 1 deleting the unperformed contract work and commensurately reducing the contract price. The remaining amount of the contract price, namely, \$90,375.00, which was paid to FSS, was for work performed prior to the stop order and partially fabricated materials. Those materials, which became the property of the Government as the result of the payment, included a quantity of sprinkler piping and related hardware which was being readied for installation at the time of the stop work order (tr. 67).

9. On 27 July 1999, the Navy issued a competitive, sealed bid solicitation for the present contract (Contract No. 2), which was for the completion of the work begun under Contract No. 1. The drawings and specifications included in the solicitation for the present contract were identical to those in Contract No. 1 as awarded. The Navy took that course because it was satisfied with the original scheme and saw no need to expend funds for revision of the contract drawings to reflect the changes agreed to with FSS under Contract No. 1. There was also concern about the risks associated with making available, to another contractor, the partially fabricated piping left over from Contract No. 1. (Tr. 73).

10. FSS, however, compiled its bid on the basis that the Government would agree to all of the design changes which had been developed under Contract No. 1 (tr. 156; findings 2 through 5). Accordingly, the amount included in the bid price for VHE's was based on the

work as defined in Change Nos. 3 and 4 rather than the design shown in the contract drawings in the solicitation and the prior contract.

11. FSS was the successful bidder for the present contract. Award was made on 23 September 1999 at the firm, fixed price of \$364,000. At the pre-construction conference, held on 6 October 1999, FSS asked about the availability of the partly fabricated materials left over from Contract No. 1 and expressed an interest in repeating the design changes which had been agreed to under Contract No. 1. The record does not indicate that FSS identified the specific changes which it considered had been agreed to previously. Ms. Seiling, the AREICC, who had been designated as project manager for the present contract, understood this proposal as referring solely to Change Nos. 1 and 2. Based on that understanding, she agreed to the proposal. (Tr. 70-71; finding 2). From a technical standpoint, Change Nos. 3 and 4 were wholly independent of Change Nos. 1 and 2 (tr. 249-50).

12. FSS, however, planned to implement all of the design changes developed during Contract No. 1. There is testimony that, during a joint visit to the buildings following the preconstruction conference, FSS discussed certain aspects of Change Nos. 3 and 4 with the Navy's representatives (tr. 117-18, 202, 203). How much of that discussion took place in the presence of Ms. Seiling is not clear from the record. Her testimony at the hearing was that she did not become aware of Change Nos. 3 and 4 until much later, on or about 28 March 2000 (tr. 251). There is also the testimony of Mr. Lewis ("Rabbit") Jackson, who served as superintendent for FSS as to both contracts. During a conversation with Ms. Seiling at the end of March, 2000, she indicated that care should be exercised in attaching the VHE's to the outside walls, signifying that she was not aware of Change No. 4. She seemed surprised when told of that change (tr. 126). On that record, we find that Ms. Seiling did not actually know of Change Nos. 3 and 4 until on or about 28 March 2000.

13. The shop drawings for the sprinkler system required by the contract were submitted by FSS on 15 October 1999 as part of Submittal No. 6 (R4, tab 4). These drawings contained Change Nos. 1 through 4. Sheet No. 9 of those drawings showed how Change No. 4 (finding 5) would be implemented for Building 705. The depiction of the one-story VHE for that building contained the legend "NEW VALVE HOUSE BUILDING 705 ONLY" with a note that "DUE TO MAIN SPRINKLER LINE ENTERING BUILDING AT FIRST FLOOR LEVEL VALVE HOUSE ONLY NEEDS TO BE BUILT TO THE FIRST FLOOR LEVEL." The VHE was omitted from Sheet No. 5 which was devoted to the sprinkler systems for Building 711.

14. Contract No. 1 and the present contract contained the FAR 52.236-21 SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984) clause which provides, in ¶ (f) that "[i]f shop drawings show variations from the contract requirements, the Contractor shall describe such variations in writing, separate from the drawings, at the time

of submission.” These provisions were supplemented by § 01330 (SUBMITTAL PROCEDURES), ¶ 1.3.4. (VARIATIONS) of the specifications requiring that the proposal of a variation include a statement of “why the variation is desirable and beneficial to the Government.” FSS was also instructed that “[i]f lower cost is a benefit, also include an estimate of the cost saving.” None of the foregoing descriptions and other information was ever submitted by FSS.

15. Submittal No. 6 containing the sprinkler shop drawings was sent to Ms. Seiling. Her assumption, upon receipt of the drawings was that they varied from the contract drawings only to the extent which she understood had been agreed to at the preconstruction conference, namely, Change Nos. 1 and 2 (tr. 77). In the absence of the required variation disclosure (finding 14) detailing the proposed design changes, Ms. Seiling followed her normal practice of not reviewing the submitted drawings (tr. 252-53). Instead, she sent them to the Navy’s fire protection engineer for review and comment (tr. 76). Concurrently, she returned Submittal No. 6 to FSS marked disapproved on the ground that FSS had failed to offer a price reduction for Change Nos. 1 and 2 (tr. 77-78).

16. Thereafter, by letter to Ms. Seiling dated 29 November 1999, FSS “request[ed] a variance to the contract to provide residential sprinklers under NFPA 2-5.1.6 in lieu of light hazard requiring heads every 144 square feet” (*i.e.*, Change No. 2). FSS offered a price reduction of \$8,066.00 for that change. (Ex. B-1 at 0015) A cost estimate in support of that offer, which was attached to the letter, described the subject-matter as “delete 72 heads Building 705, delete 44 heads Building 711” (Ex. B-1 at 0017, 0018). FSS also requested a contract change “eliminat[ing] the soffit system around the [sprinkler] pipe and install the piping above the existing ceiling and install new access panels” for which a price reduction in the net amount of \$6,136.00 was offered (ex. B-1 at 0015).<sup>\*</sup> FSS also requested that the Government make available, for use under the present contract, the sprinkler piping and related hardware left over from Contract No. 1 (finding 8) and offered a price reduction of \$5,241.00 for said material. (Ex. B-1 at 0015-0028)

17. By letter to Ms. Seiling, dated 7 January 2000 (R4, tab 5), FSS made a revised proposal relating to Change Nos. 1 and 2 (finding 2) as follows:

Fire Security Systems, Inc. requests a variance to the contract to provide residential sprinklers under NFPA 2-5.1.6 in lieu of light hazard requiring heads every 144 square foot [sic]. There will be (1) near the center of the building instead of (2) mains as shown on the governments [sic] drawings. The credit for this change is \$ **13,121.00**.

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<sup>\*</sup> By letter dated 5 January 2000 (ex. B-1 at 0014), Ms. Seiling directed FSS to process this matter separately.

(Emphasis in the original)

18. There is no explanation in the record for the failure of FSS to make reference to Change Nos. 3 and 4 (findings 3 through 5) in the above credit offers.

19. Ms. Seiling wrote “APPROVED NS 1/7/00” on the face of the 7 January 2000 letter thereof (ex. B-1 at 0009), signifying that the offer was acceptable to her, and sent a copy of the letter with that notation to FSS (tr. 87). Ms. Seiling took that action in the belief and understanding that the offered \$13,121.00 credit related only to the two matters identified in the letter, namely, Change Nos. 1 and 2 (tr. 248).

20. By letter dated 3 February 2000 (R4, tab 8), FSS made the following offer to Ms. Seiling:

Per our phone conversations we have agreed on a credit to the government [sic] for a variance to the sprinkler system. The credit change proposal is in the amount of **\$13,121.00**.

FSS offers a credit for government [sic] furnished pipe, fittings, hangers and miscellaneous material from the previous sprinkler project. That credit proposal is for **\$6,879.00**.

(Emphasis in the original) Ms. Seiling and Mr. Dolan were the parties to those conversations. Only Ms. Seiling could recall the content of those conversations. She stated and we find that the \$13,121.00 amount related to the agreement reached on 7 January 2000 (Tr. 245, 247; finding 19).

21. On 22 March 2000, the parties entered into bilateral contract Modification No. P00002 (R4, tab 2) providing in part as follows:

The parties hereto mutually agree to the following contract prices as complete equitable adjustment for the following:

PC #000001: Provide credit costs associated with:

1. Redesign the sprinkler layout in accordance with your approved sprinkler submittal, detailing the variance request.
2. Reuse the sprinkler materials furnished by the government [sic]. Material furnished by the Government includes all interior sprinkler piping and fittings for B711 and B705 excluding

sprinkler heads, valves, main 4" riser piping, accessories and fittings.

3. Mark as-built drawings showing these changes.

AMOUNT:           \$ -20,000.00

As the result of the Modification agreed to herein, the total contract price is hereby decreased by \$-20,000.00, from \$364,000.00 to \$344,000.00. The contract period of performance remains unchanged.

....

**"CONTRACTOR'S STATEMENT OF RELEASE"**

Acceptance of this modification by the contractor constitutes an accord and satisfaction and represents payment in full for both time and money and for any and all costs, impact effect, and for delays and disruptions arising out of, or incidental to, the work as herein revised.

22. The evidence indicates that ¶ 1 of contract Modification No. P00002 was intended to encompass Change Nos. 1 and 2. The provision is identical to text in a memorandum, dated 3 February 2000, from Ms. Seiling to the contracting officer requesting the issuance of that modification (Ex. B-1 at 0006). As of that date, Change Nos. 1 and 2 were the only ones known to Ms. Seiling (finding 12).

23. During a visit to the site which took place on or about 28 March 2000, from information provided by Jackson, Ms. Seiling first learned of the content, and planned implementation, of Change Nos. 3 and 4 (tr. 91-92).

24. In a letter to FSS dated 27 April 2000 (R4, tab 10), Ms. Seiling stated that although Change Nos. 3 and 4 seemed acceptable, they appeared to "represent a variation from the contract documents and appear to require less labor and material." On 28 April 2000, FSS responded that that "the negotiations agreed to on Feb[ruary] 3, 2000 (Modification No. P00002) for sprinkler variances included all the alterations that were shown on the drawings" (R4, tab 11).

25. The contracting officer thereafter notified FSS, in a letter dated 21 July 2000 (R4, tab 12), that the Government was seeking a price reduction for Change No. 4. In a letter to FSS, dated 5 September 2000, the contracting officer stated that contract

Modification No. P00002 “did not cover the credit due . . . for” the VHE’s (R4, tab 14). In its letters to the contracting officer of 30 August 2000 (R4, tab 13) and 12 September 2000 (R4, tab 15), FSS asserted that the price reduction effected in contract Modification No. P00002 encompassed all of the sprinkler system changes shown in the shop drawings previously submitted to the Navy.

26. The Government withheld payments from FSS in order to satisfy the credit deemed due for Change No. 4. In its letter of 12 September 2000, FSS demanded that the Government either pay the withheld amount to FSS or issue a contracting officer’s decision on the matter (R4, tab 15). On 15 September 2000, the contracting officer issued a change order, designated as unilateral contract Modification No. P00003, implementing Change No. 4, *i.e.*, deleting entirely the VHE at Building 711 and deleting the upper two floors of the VHE at Building 705. That modification also contained the contracting officer’s determination that the contract price should be reduced in the amount of \$19,278.00 by reason of said deletions. (R4, tab 2) FSS does not contest the amount of that reduction (app. br. at 10).

27. By letter dated 6 February 2001 (R4, tab 20), FSS submitted a claim to the contracting officer, in the amount of \$20,000.00, for recovery of the funds withheld by the Government for the price reduction under contract Modification No. P00003 and requested a contracting officer’s decision relating to that claim. The requested decision had not been issued as of 24 August 2001. On that date, FSS filed the present appeal based on the deemed denial of its claim.

### DECISION

FSS devised Change Nos. 1 through 4 during Contract No. 1 (finding 2). During that contract, however, only Change Nos. 1 and 2 were proposed and agreed to by the Government (finding 6). The present contract (Contract No. 2) was awarded on the basis of the drawings and specifications included in Contract No. 1, without regard to the changes devised by FSS (finding 9). At the preconstruction conference for Contract No. 2, FSS proposed that the changes agreed to under Contract No. 1 be implemented under Contract No. 2. There is no indication in the record that FSS individually identified the changes covered by that proposal (finding 11). Ms. Seiling, the AREICC who served as project manager for the Navy, agreed to the proposal in the belief that it related only to Change Nos. 1 and 2.

FSS bid Contract No. 2 on the basis of implementing Change Nos. 1 through 4 during the contract. It prepared and submitted shop drawings containing all of these changes. All of the changes involved variations from contract requirements (findings 2 through 5). FSS failed to comply with the requirement of the FAR 52.236-21 SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984) clause to submit descriptions of those variations separately from the drawings (finding 14). Had it done so,

the Navy would have been informed of the full scope of the changes desired and proposed by FSS and the present dispute would thereby have been avoided.

Subsequently, for reasons which are not disclosed in the record, FSS, in communications relating to the credit to the Government for deleted work, repeatedly described that work exclusively in terms of Change Nos. 1 and 2 (findings 16, 17, 20). This was in harmony with Ms. Seiling's view that the credit was confined to the effect of those changes (finding 19). Although the subject matter description in ¶ 1 of contract Modification No. P00002 differs from the description in the letter of 7 January 2000 (finding 21), there is no contention from FSS, however, that it relates to Change Nos. 3 or 4. Such an interpretation would be unreasonable inasmuch as those changes do not involve the "sprinkler layout" (finding 21)

FSS may, indeed, have intended to include Change Nos. 3 and 4 within the scope of contract Modification No. P00002. However, it never communicated that intention to the Navy. It is well established that an uncommunicated, subjective intention of a party cannot be used to overturn the interpretation of contract provisions which would otherwise apply. *Bradford Electric Co.*, ASBCA No. 43356, 93-2 BCA ¶ 25,694 at 127,813.

Inasmuch as Change Nos. 3 and 4 were outside the scope of contract Modification No. P00002, the work which would have been deleted by those changes continued to be a contract requirement. As a result, contract Modification No. P00003, deleting those requirements, was an effective change order. It was a deductive change order, entitling the Government to an equitable adjustment in contract price therefor. *South Pittsburgh Cable Co.*, ASBCA No. 40014, 91-3 BCA ¶ 24,125 at 120,742. The contracting officer has determined that the contract price should be reduced in the amount of \$19,278.00 by reason of said deletions. That amount is not contested by FSS (finding 26).

### CONCLUSION

Change Nos. 3 and 4 were not encompassed within contract Modification No. P00002. Accordingly, the Government was entitled to a price reduction when that work was deleted from the contract pursuant to contract Modification No. P00003. For that reason, the claim of FSS for the amount of that reduction was properly denied. Accordingly, the appeal is denied in all respects.

Dated: 26 March 2002

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PENIEL MOED  
Administrative Judge

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Armed Services Board  
of Contract Appeals

I concur

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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. 53498, Appeal of Fire Security Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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