

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Wilco Construction, Inc.) ASBCA No. 53683
)
Under Contract No. DACA56-00-C-2021)

APPEARANCE FOR THE APPELLANT: Robert L. Magrini, Esq.
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APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
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U.S. Army Engineer District,
Tulsa

OPINION BY ADMINISTRATIVE JUDGE SCHEPERS
PURSUANT TO BOARD RULES 11 and 12.3

This timely appeal is from a contracting officer’s decision which denied appellant’s claim for costs allegedly incurred in temporarily relocating and returning basement libraries to their original space, a small line item in a contract for major upgrade in Building 730. Appellant contends approximately 60,000 books, three times what it reasonably anticipated, were included in the temporary library and the material “deemed nonessential” to be moved or stored. Appellant elected the accelerated procedures prescribed in Board Rule 12.3 and the parties submitted the appeal for decision on the record pursuant to Board Rule 11. Entitlement is before us. The contract required the “libraries” to be “temporarily relocated” during the library upgrade, and seemingly all library books were visible during a site inspection. We deny the appeal.

SUMMARY FINDINGS OF FACT

1. On 21 July 2000 IFB No. DACA56-00-B-2008 issued to upgrade Building 730, Fort Sill’s premier teaching facility, which has libraries in the basement (R4, tab 4). The upgrade was to bring the building into compliance with current life safety codes. Relocation of the libraries was a separate line item.

2. The solicitation included: FAR 52.233-1 DISPUTES (DEC 1998); FAR 52.243-4 CHANGES (AUG 1987); FAR 52.214.29 ORDER OF PRECEDENCE-SEALED BIDDING (JAN 1986); and FAR 52.236-3 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984) which states:

(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, river stages, tides, or similar physical conditions at the site; (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

(b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

(R4, tab 5a at 27)

3. The solicitation also included FAR 52.236-21 SPECIFICATIONS AND DRAWINGS for CONSTRUCTION (FEB 1997) which states in 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. In case of discrepancy in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Any adjustment by the Contractor without such a determination shall be at its own risk and expense.

4. The solicitation also included DFARS 252.236-7001 CONTRACT DRAWINGS, MAPS, AND SPECIFICATIONS (DEC 1991) which states in part:

(d) Omissions from the drawings or specifications or the misdescription of details of work which are manifestly necessary to carry out the intent of the drawings and specifications, or which are customarily performed, shall not relieve the contractor from performing such omitted or misdescribed details of the work, but shall be performed as if fully and correctly set forth and described in the drawings and specifications.

(R4, tab 5a at 160)

5. Amendment No. 0001 to the IFB was issued effective 14 August 2000 with major changes made to the library relocation requirements (R4, tab 6 at 1). Section 01025 MEASUREMENT AND PAYMENT, Paragraph 1.6 PHASE 5 LIBRARY RELOCATIONS as revised by Amendment No. 0001 states:

Work will not be separately measured. Payment shall be made at the contract price for the bid item “Phase 5—Relocation of Libraries,” which price shall constitute full compensation for all labor, equipment, tools, and incidentals necessary to relocate the libraries as indicated in Section 01040 including temporary trailer(s).

(R4, tab 6 at 33) Section 01040, CORDINATION, FIELD ENGINEERING, AND MEETINGS, Paragraph 1.8 LIBRARY AND RESEARCH LIBRARY RELOCATIONS as revised by Amendment No. 0001 states in part:

The Contractor shall hire a qualified mover that specializes in relocating libraries to pack, temporarily relocate the library and research library, repack and move the libraries back into the original spaces upon completion of work in the library areas. . . . The Contractor shall store library materials deemed nonessential for the libraries to function during the construction period. Stored materials shall be clearly identified and cataloged and kept in a humidity and temperature-controlled, waterproof environment suitable for library materials that shall be secured to guard against theft and/or vandalism. The Contractor shall be responsible for replacement of library reference materials and related items lost, stolen, or damaged during the period of time the Contractor is working in the library areas until the libraries are back into their original areas.

1.8.1 Trailer for Temporary Library Relocation

The Contractor shall furnish temporary trailer(s) as needed to provide housing for the libraries during construction activities in Phase 5. Contractor shall provide temporary connections for all utilities (except sanitary sewer) including communication lines (phone and computer hookups). Trailers(s) shall be heated and cooled and lockable. Location shall be as indicated on the drawing. Trailer(s) will not be permitted on site prior to 29 April 2001. Interior layout shall be as directed by the Contracting Officer.

1.8.1.1 Trailer Contents

Trailer(s) shall provide space for a functional temporary library consisting of the following items:

STUDENT LIBRARY

21,000 books (can be shelved on 70 back-to-back bookcases)

Reference books (can be shelved on 2 single bookcases)

COMMAND HISTORIAN LIBRARY

150 books (1 single bookcase)

Note: Bookcase size - 3' wide x 6' - 9" high x 8 Deep (16" Deep [sic] for back to back).

2 Student Desks (Size: 3' long x 2' wide, each)
2 Filing Cabinets (1 ea. for librarian and command historian)
4 Single bookcases for battle analysis videos
5 Single bookcases for current magazines and newspapers
 [Size (ea.): 3' wide x 6' - 9" high x 12" Deep]
Atlas Stand (2' x 2.5')
1 Reference Table (6' x 3') with 4 chairs
1 Reading Table (6' x 3') with 4 chairs
1 Display bookcase
2 Photocopiers (3' x 2' ea.)
3 Desks (1 ea. for librarian, Command Historian, circulation)
 with chairs

1 Computer for librarian with printer
1 Computer for Command Historian with printer
2 Computers for students with 1 shared printer
1 Computer for circulation desk with printer

NUMBER OF PHONE LINES/COMPUTER LAN DROPS

1 Telephone for Command Historian
2 Telephone [sic] for librarian (1 for student use, 1 for
librarian)
1 Computer LAN drop for Command Historian
1 Computer LAN drop for librarian
2 Computer LAN drops for student computers

(R4, tab 6 at 25-26)

6. Except for the roughly 21,150 books to be stored in the temporary library, the bid documents did not estimate the number of books that would need to be stored during construction. The bid document did not define or otherwise describe what library materials would be deemed “nonessential.”

7. Drawing C001, Site Plan, identifies a rectangle as “Temporary Trailer for Library-Refer Specs” which, according to the scale was approximately 24' x 60' or 1,440 square feet (SR4, tab 4-e).

8. Drawing A101 indicates the location of a number of “stacks” within several rooms (SR4, tab 4-g).

9. On 10 August 2000 appellant made a site inspection, the only potential bidder to do so. During that inspection, appellant toured the original libraries in Building 730. There is no evidence appellant inquired regarding moving and storing the approximately 60,000

library books seemingly visible during the site inspection, or that appellant was accompanied by a mover that specialized in relocating libraries. (R4, tab 7a at 1, 4-5, tab 7c at 1, tab 8)

10. Bid opening of 2 p.m. 24 August 2000 was not changed by Amendment No. 0001 (R4, tabs 5a at 6, tab 6). Appellant's bid was \$50,091 for Phase 5—Relocation of Libraries; the Government's estimate of this work was \$46,766 (SR4, tab 2).

11. On 31 August 2000 appellant was awarded Contract No. DACA56-00-C-2021 (the contract) in the original amount of \$3,403,520 (R4, tab 4 at 1-2).

12. On 28 September 2000 Notice to Proceed was issued and acknowledged (R4, tab 4 at 3). The contract was to be completed in 415 days (R4, tab 6 at 25).

13. On 20 June 2001 representatives of appellant, appellant's subcontractor (which was required by the contract to be a qualified mover that specialized in relocating libraries and which seemingly had not performed a site visit prior to submitting a bid to appellant), and the Government met to review the work requirements. Appellant's minutes of the meeting reflect that appellant stated it included one 24' x 60' double wide classroom trailer in its bid for this project based upon: (1) the provisions of Section 01040-1.8.1 which set out only 21,150 books; and (2) the diagram on Sheet C001 showing the size of a trailer. Appellant stated it assumed the nonessential materials to be stored would be an inconsequential number of items. The Government stated that appellant was required by the contract to provide as many trailers as necessary to accommodate the temporary library, and the list of contents described in 01040-1.8.1.1 could not be located in one 24' x 60' trailer. (R4, tab 7g)

14. The Government: (1) reduced the number of books and materials required for the temporary library so that appellant could use only one trailer; and (2) provided space for the remaining books and other library materials in the basement of Building 730 to eliminate appellant's costs of storage off-post (R4, tab 7a at 5, tab 7c at 1).

15. On 11 September 2001 appellant submitted its claim for \$34,471 for moving and storing the "library materials deemed nonessential" (primarily the 40,000 books which were in excess of the 21,150 set out in the specifications) (R4, tab 7b at 1, tab 7d), which was denied 7 November 2001 (R4, tab 2). This timely appeal followed.

16. The affidavit dated 23 May 2002 of Mr. Larry Greene, the project manager and estimator for appellant, states in part:

4. The number of books that would need to be stored could not be determined from the drawings or site visit. Wilco was furnished drawings that showed isolated "stacks" of books

in three rooms, D014, D016 and the Doctorial Research Center, D019. The areas total approximately 2,500 s.f. However, there were actually books located throughout those three rooms. The actual area of books was roughly 6,300 s.f. There were also books in three other rooms (D017, D019A and D019B).

5. The pre-bid site visit conducted by Wilco was limited in scope. It was never suggested that Wilco should count or otherwise calculate the number of existing books.

A second affidavit dated 13 June 2002 repeats some of this information. But there is no additional evidence to clarify the statements above.

DECISION

Appellant contends that it is entitled to the costs of moving and storing 40,000 of the approximate 60,000 library books, on the theories of defective specifications and drawings, and superior knowledge. Appellant points out that only 21,150 books were specifically set out in the specifications as books for the temporary library, that “nonessential” library materials to be stored was not defined, and thus appellant assumed few, if any, books were included in this term. Also appellant, referring to the statements in paragraph 5 in finding 16, argues that the Government should have given the bidders the number of books in the libraries (app br. at 8). The Government disputes appellant’s contentions and also argues that the contractor’s expenses, a portion of which even under appellant’s interpretations should have been within appellant’s bid, were reduced when the Government: (1) reduced the books necessary in the temporary library so that only one trailer was required; and (2) provided appellant storage area in the basement of Building 730 so that the costs of moving and storing the remaining books off-post were eliminated.

Regarding appellant’s contention of defective specifications and drawings, it is undisputed the specifications required that appellant (or its subcontractor who was required to be a qualified mover specializing in relocating libraries) move or store the items in the library during the renovation. The Specifications and Drawings for Construction clause provides that “[a]nything 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.” Thus, the failure of the drawings to show all the books does not control over the clear specifications requirement.

Further under the provisions of the Site Investigation clause appellant was responsible for estimating properly the difficulty and cost of successfully performing the work without additional expense to the Government after taking steps reasonably necessary to ascertain the nature and location of the work, and investigating and satisfying itself as to

the general and local conditions which could affect the work or its cost, including conditions bearing upon transportation, handling, and storage of materials. The Government assumed no responsibility for any conclusions or interpretations made by appellant based on the information made available by the Government. Seemingly the books and other library materials, all of which had to be moved during the renovation, were observable during the site investigation. Appellant cannot prevail on the theory of defective specifications and drawings.

Regarding appellant's second assertion, the elements of proof for superior knowledge are:

(1) a contractor undertakes to perform without vital knowledge of a fact which affects performance costs or duration, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, (3) any contract specification supplied misled the contractor or did not put it on notice to inquire, and (4) the government failed to provide the relevant information.

Hercules, Inc. v. United States, 24 F.3d 188, 196 (Fed. Cir. 1994), *aff'd on other grounds*, 516 U.S. 417 (1996), citing *American Ship Bldg. Co. v. United States*, 654 F.2d 75, 79, 228 Ct. Cl. 220 (1981). Appellant failed to meet this burden of proof, and cannot prevail on a theory of superior knowledge.

Appellant is not entitled to recover under the theories of defective specifications and drawings or superior knowledge, or on any other grounds of which we are aware. Accordingly the appeal is denied.

Dated: 25 July 2002

JEAN SCHEPERS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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. 53683, Appeal of Wilco Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

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