

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Collazo Contractors, Inc.) ASBCA No. 53925
)
Under Contract No. N62472-98-C-4150)

APPEARANCE FOR THE APPELLANT: Kenneth P. McKay, PE, Esq.
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APPEARANCES FOR THE GOVERNMENT: Susan Raps, Esq.
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OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON APPELLANT'S MOTIONS FOR RECONSIDERATION AND TO STRIKE

Appellant filed a timely motion for reconsideration of our decision in the above-captioned appeal insofar as it denied Claim Items 1 through 4, 7, and 8 reported as *Collazo Contractors, Inc.*, ASBCA No. 53925, 05-2 BCA ¶ 33,035. We concluded that appellant was entitled to a contract time extension of six days, together with an appropriate contract price adjustment, and otherwise denied the appeal. 05-2 BCA at 163,748. Appellant has also moved to strike the government's response to its motion for failure to provide service.

APPELLANT'S MOTION TO STRIKE

Appellant filed its motion for reconsideration on 24 August 2005. The government filed its response on 6 October 2005. Appellant then filed a motion to strike on 20 October 2005, asserting that it had not received an answer from the government to its letter of 4 October 2005 inquiring about the government's response to its motion and that it had not received a copy of the government's response, although it had learned from the Recorder on 18 October 2005 that a response had been filed. The Board directed the government to respond to the motion to strike and the government did so on 25 and 31 October 2005, explaining that the government's response was filed 30 days after receipt in accordance with the Board's 26 August 2005 Order, that it had

experienced mail delivery problems which are not uncommon in its office, and that a copy of the response had been mailed to appellant on the same day it was filed with the Board. Appellant at some point did receive a copy of the government's response, because it filed a reply on 14 November 2005.

As is apparent from the recitation of the relevant facts, the government filed a timely response to appellant's motion, appellant received a copy of the response and filed its reply. There is no prejudice to appellant and its motion to strike is denied.

APPELLANT'S MOTION FOR RECONSIDERATION

Appellant raises four separate grounds for reconsideration that largely consist of improper reargument. *See McDonnell Douglas Electronics Systems Co.*, ASBCA No. 45455, 99-1 BCA ¶ 30,132 at 149,057. First, it contends that the Board abused its discretion in allowing the government's expert, Mr. Robert Tabet, to testify on conclusions not included in his report that were in rebuttal to the report and testimony of appellant's expert, Mr. Joe Dioslaki. The government's response summarizes the argument presented to the Board at the beginning of the hearing with regard to the confusion and discussions between counsel associated with the late identification of both experts precipitated by appellant's written pre-hearing objection seeking to exclude the written report and testimony of Mr. Tabet. Following the argument, counsel for appellant withdrew his objection so long as he would be afforded the opportunity to have Mr. Dioslaki respond to Mr. Tabet. Counsel for the government did not object and the Board agreed to the request. (Tr. 1/17-24) Appellant examined both Messrs. Dioslaki and Tabet at length (tr. 2/74-85, 102-105, 122-139, 3/42-54, 64-65, 74-76). Appellant was given the opportunity to have Mr. Dioslaki respond to Mr. Tabet and has not been prejudiced in any way by any testimony that could be considered to be outside the "metes and bounds" of the expert report. Appellant's first contention is without merit.

Appellant's second contention is that the Board committed clear error because it failed to determine that the requirement for a four-inch tee was a defective specification or, as stated in its reply, was the root cause of the failed system. This contention is not a valid ground for reconsideration inasmuch as it was at the crux of the appeal, was fully considered and rejected. *See NMS Management, Inc.*, ASBCA No. 53444, 04-1 BCA ¶ 32,415 at 160,460. In any event, it relies upon the first contention (which we rejected above) and a witness who is not an engineer and who did not testify that the only way to meet the specification was to use six-inch tees (tr. 1/148-50). Further, our decision considered the testimony regarding residual pressure, but declined to adopt appellant's expert's theory in the face of other credible evidence. *Collazo*, 05-2 BCA at 163,743-44. Nor do consider Mr. Tabet's testimony to be unreliable when considered in context and in its entirety. Likewise, we do not read Mr. Stauffer's testimony as admitting that the specification in dispute was defective.

Appellant's third contention is that the Board incorrectly found that it voluntarily submitted the test results for approval. The only evidence offered to support this contention is appellant's trial exhibit A-11, a fax cover sheet that indicates that Mr. Conley sent a copy of the flow test results to Mr. Paquette. There is nothing in A-11 that in any way supports appellant's argument that the government insisted upon reviewing and approving the test flow results.

Appellant's final contention is that the Board erred in placing the burden on appellant to change the test methodology. Appellant, however, does not explain the contention or how the Board erred, although its reply seems to suggest that this argument also is based upon the belief that the specifications were defective. In any event, it broadly asserts that the government refused its requests for a meeting, an allegation that apparently assumes the government is obligated to agree to every such request made. In doing so, it ignores the telephone conversations between Mr. Conley and the government in which they discussed the difficulties appellant claims the government would not address. Further, its allegation that the government never provided written approval is contrary to the evidence. *Collazo*, 05-2 BCA at 163,736-37.

CONCLUSION

Based upon the foregoing, appellant's motion for reconsideration of our decision denying Claim Items 1 through 4, 7, and 8 is denied.

Dated: 7 February 2006

CAROL N. PARK-CONROY
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. 53925, Appeal of Collazo Contractors, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals