

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Advanced American Construction, Inc.) ASBCA No. 56325
)
Under Contract No. W912EF-06-C-0019)

APPEARANCE FOR THE APPELLANT: Joseph A. Yazbeck, Jr., Esq.
Yazbeck, Cloran & Hanson, LLC
Portland, OR

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Jill Schmid, Esq.
Trial Attorney
U.S. Army Engineer District,
Walla Walla

OPINION BY ADMINISTRATIVE JUDGE WILLIAMS
ON THE GOVERNMENT’S MOTION FOR SUMMARY JUDGMENT
AND THE APPELLANT’S CROSS-MOTION

This appeal involves a U.S. Army Corps of Engineers (government) contract with Advanced American Construction, Inc. (AAC or appellant) for a spillway weir and an AAC claim for a time extension. The parties have filed a motion and a cross-motion for summary judgment. The government’s motion is denied. Appellant’s cross-motion is denied.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. The government issued Solicitation No. W912EF-06-R-0007 on 24 January 2006. The solicitation sought proposals for the fabrication and installation of a removable spillway weir (RSW) at the Lower Monumental Lock and Dam near Kahlotus, Washington. Proposals were due on 13 March 2006. (R4, tab C-1 at 47 and following)
2. RSWs are used to protect endangered species such as salmon. They are attached to a dam and submerged. Once installed, they are about 100 feet high and about 70 feet wide. The solicitation and contract required:

...the fabrication of approximately 2 million pounds of steel; the services of a naval architect and marine surveyor for the transport of the RSW through the [Federal Columbia River Power System] and to Lower Monumental Dam; the underwater placement of approximately 150 cubic yards of concrete; excavation of river bottom materials for a landing pad; underwater diving to depths of up to 120 feet to support the installation activities; and the surveying of the spillway, piers, and river bottom.... In order to get the RSW operational, the contract also called for various water and air piping, valves and appurtenances; two 13" bore, self-lubricating spherical bearings; and three air compressors.... Finally, the contract required AAC to support testing of the RSW once the fish passage season had ended, in the Fall of 2007....

(R4, tab A at 2; app. opp'n, ex. C)

3. Appellant states that the Lower Monumental (LoMo) RSW was the government's third RSW project. RSWs had previously been installed at the Lower Granite Lock & Dam and at the Ice Harbor Lock & Dam. Installation of the Lower Granite RSW was over six months later than planned. The solicitation notice for the Ice Harbor RSW noted that schedule for fabrication, transport, and installation was considered "aggressive." Although the Ice Harbor RSW project was smaller than the Lower Granite project, the government gave the contractor more time than had been made available on the Lower Granite project. Most of the same people and companies were involved on the Lower Granite and Ice Harbor RSW projects. (App. opp'n at 6-7)

4. AAC asserts that the government had superior knowledge of the following matters that it did not share with appellant or other bidders: commitments and other events made the proposed LoMo installation schedule inflexible; the government wanted to give the contractor as much as fourteen months; the government took on LoMo design responsibilities and ultimately used a new contractor and new fabricator; although it wanted to give the contractor more time on LoMo the solicitation and award dates slipped; the government eventually removed one month from the time allowed for fabrication; and, the LoMo schedule was considered "aggressive." (App. opp'n at 7-9)

5. Block 11 of the solicitation (Standard Form 1442) stated that the contractor was to begin performance within 10 calendar days and complete it within 247 days of receiving a notice to proceed (NTP). Block 13.D stated that offers that provided less than 60 calendar days for government acceptance after the date offers were due would be rejected. (R4, tab C-1 at 47)

6. Section 00100 of the solicitation set out Instructions To Offerors (R4, tab C-1 at 65-73). Offerors were required to submit a technical proposal documenting four factors. The fourth was the Product Activity Schedule or Prime Contractor Schedule that incorporated various activity elements including steel fabrication, dam preparation, diving activities, land transport, water transport, and RSW installation. With respect to the Schedule, the solicitation provided as follows:

Requirement 1. The Prime Contractor shall provide in PRIME CONTRACTOR SCHEDULE (TAB D) a schedule that incorporates the various ACTIVITY ELEMENTS above. Include your proposed operations and sequence of work that demonstrates your firm's ability to understand and accomplish the work within the required timeframe. **For the proposal development purposes only, the start date shall be 30 March 2006.**

NOTE: The schedule must identify the activities, sequences of work and durations of major activities. The schedule must also demonstrate completion of the following major milestones:

- a. Performance and payment bonds
- b. Delivery of major elements to Lower Monumental Dam (those anticipated to require transport by water through the Columbia and Lower Snake River) by not later than February 20, 2007.
- c. Installation of the completed RSW structure, secured and deployed (upright) at the dam, by not later than March 20, 2007.

(R4, tab C-1 at 72) (Emphases in original)

7. The solicitation and contract, at § 01320, required the contractor to prepare a Project Schedule (R4, tab C-1 at 251, tab C-4) pursuant to FAR 52.236-15, SCHEDULES FOR CONSTRUCTION CONTRACTS (APR 1984) which was incorporated into the contract by reference (R4, tab C-1 at 132). This would be the document used by appellant and the government to show the schedule of work, measure progress, and provide the basis for progress payments. Section 01320, ¶ 3.4.1 stated that the initial Project Schedule was to be submitted to the government within 20 calendar days after issuance of the NTP (R4, tab C-1 at 252, tab C-4 at 2).

8. On 1 February 2006, the government issued Amendment No. 0001, which changed the completion time for the project listed at Block 11 of the solicitation (SF 1442) from 247 days after receipt of the NTP to 435 calendar days after receipt of the NTP (R4, tab C-1 at 35). The government says that the 435 days were comprised of 345 days for fabrication and installation and 90 days for support of government testing operations (gov't mot. at 2). Appellant asserts that neither Amendment No. 0001 nor the contract divide the 435 days provided for completion of the contract into 345 days for fabrication and installation and 90 days for support of government testing (app. opp'n at 10).

9. Section 00800, Special Contract Requirements, included FAR 52.211-10, COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK (APR 1984). The clause set out the following contract milestones.

The Contractor shall commence work under this contract within 10 calendar days after receipt of notice to proceed, prosecute the work diligently, and complete the entire work ready for use not later than the dates listed below.

1.1 The navigation locks at the dams on the Columbia and Snake Rivers are tentatively scheduled to be shut down for maintenance, inspection and repair work beginning at 0600 on 3 March 2007 and will be closed until 2359 on 17 March 2007.

1.2 All in-river work shall be performed during the time period 15 December 2006 and 28 Feb 2007, inclusive. In-river work will include excavation and placement of the landing pad, removal of overburden material and debris, excavation for and installation of the hinge frames, and demolition of the concrete pier.

1.3 The new non-overflow dam compressed air system shall be furnished, installed, and tested by 15 September 2006. Work included will be limited to that specified in Section 15211. The Contractor shall complete final submission of working "as-built" contract drawings (see Section 01010), O&M manuals, and final approved versions of Contractor prepared drawings (see Section 01330) by not later than 30 calendar days after completion of the installation and testing of the compressed air system.

1.4 All work on the face of the dam and in the forebay shall be performed between 1 September 2006 and 31 March 2007, inclusive. Dam face work shall include underwater dam face and forebay surveys, drilling, cutting, welding, and other work as required for installation of hinges, seals and equipment for the RSW installation.

1.5 Lower Monumental Dam operates the spillways for fish passage during the spring, starting in April of each year, and continuing through the summer, scheduled through the end of August of each year. Dates are subject to change due to river conditions or operations for fish passage. Other miscellaneous diving, and underwater inspections (Section 01720) may commence prior to 1 September 2006 if river conditions allow and if coordinated and approved in advance.

1.6 The Contractor shall deliver the RSW to the Lower Monumental dam forebay by 20 February 2007.

1.7 The Contractor shall complete installation of the RSW, ready for Government testing and commissioning by 13 April 2007.

1.8 The Government will perform operational testing and commissioning of the RSW during the time period 1 September 2007 through 30 November 2007. The Contractor shall provide all specified support activities during the RSW testing and commissioning.

1.9 The Contractor shall complete final submission of O&M manuals within 30 calendar days after completion of work in 1.7.

1.10 The Contractor shall complete final submission of working "as-built" contract drawings (see Section 01010) and final approved version of Contractor prepared drawings (see Section 01330) by not later than 60 calendar days after completion of work in 1.7 above.

1.11 The Contractor shall complete final cleanup and demobilization by not later than 30 days after completion of work in 1.7 above.

1.12 Other Contracts. The Government may award other contracts for additional work to be performed in the vicinity of this work. The work area and restrictions and limitations caused by the work to be performed by others shall be considered by the Contractor in scheduling work to be performed. No allowance will be made for damage or extra compensation because of the required cooperation.

(R4, tab C-1 at 141-142)

10. Appellant points out that the solicitation and contract included provisions mentioning or providing for extensions of time such as FAR 52.211-12, LIQUIDATED DAMAGES – CONSTRUCTION (APR 1984), FAR 52.211-13, TIME EXTENSIONS (SEP 2000), and Section 01320, ¶ 3.6 (R4, tab C-1 at 142-43, 254, tab C-4 at 5).

11. AAC submitted a timely proposal on 13 March 2006. The proposal included a prime contractor schedule with a start date of 30 March 2006. (R4, tab C-2; gov't mot. ¶ 6; app. opp'n at 11) The government says that the schedule shows that the RSW would be installed by 20 March 2007 (gov't mot. at 6-7). Appellant states that the schedule shows that the RSW would be attached to the dam by 7 March 2007 with a late finish of 20 March 2007. There were additional installation activities extending to 13 April 2007. (App. opp'n at 12). The government says that before submitting the proposal appellant did not express concerns about the terms of the contract (gov't mot. at 7).

12. On 17 March 2006, the government sent AAC questions about its proposal and asked that appellant submit a milestone for performance and payment bonds which was not on appellant's schedule (R4, tab D-1).

13. Appellant responded to the government's request on 22 March 2006. The response included a revised schedule with performance and payment bonds starting on 30 March 2006 and ending on 31 March 2006. (R4, tab D-2) AAC states that was so because 30 March 2006 was the start date and the bond activity was the first item listed. In addition, appellant says that a contractor would not buy bonds until a contract had been awarded. (App. opp'n at 12). The government states that in its response AAC did not raise concerns or articulate an assumption that the contract required an NTP by 30 March 2006 (gov't mot. at 7).

14. On 27 March 2006, the government asked appellant to verify the prices for two line items. Appellant did so the same day. (R4, tab D-3) The government notes that appellant's response did not express concern about its proposed schedule (gov't mot. at 7).

15. The government sent AAC a notice of award by mail and email on 14 April 2006 (R4, tabs D-4 and D-5). Appellant executed performance and payment bonds. The government received them on 19 April 2006 and approved them on 21 April 2006 (R4, tab E-1).

16. On 24 April 2006, the government mailed AAC a notice to proceed. Appellant received the NTP on Friday 28 April 2006 and acknowledged receipt on Monday 1 May 2006. (R4, tab D-6)

17. Representatives of the government and appellant held a prework meeting on 11 May 2006. An AAC representative asked about the completion date for the air compressor system and stated that the solicitation had required them to assume a certain NTP date while the actual NTP date was much later. The representative said that appellant would be submitting a 30-day time extension request. (R4, tab G-1 at 3).

18. Appellant requested an extension of 31 days for completion of the non-overflow dam compressed air system on 12 May 2006. The one-page letter stated that the start of work had been delayed by 31 days because the solicitation directed offerors to use a start date of 30 March 2006 and the NTP was not issued until 1 May 2006. AAC also said that the impact of the delayed NTP on performance of the other work under the contract was being evaluated. A contracting officer representative (COR) denied the request on 22 May 2006 saying that although bidders were to use 30 March 2006 as a presumed start date that date was for proposal development only. The government had not guaranteed 30 March 2006 as the start date. The COR also noted that block 13 of SF 1442 indicated that offers were due 13 March 2006 and that offers had to allow 60 days for government acceptance. (R4, tab D-7) AAC responded to the COR's letter on 7 June 2006. Appellant asserted that the denial of the time extension request had constructively accelerated its performance because of the overlap of the bid acceptance period and the dictated NTP date of 30 March 2006. (R4, tab D-8)

19. Appellant reiterated its request for 31-day time extension on 9 October 2006. Citing the RFP's required milestones of a 20 February 2007 delivery of the major elements of the RSW to LoMo and a 20 March 2007 installation of the RSW as well as the milestones in FAR 52.211-10, appellant said it was obvious that an actual start date of 30 March 2006 had been assumed despite the 60-day bid acceptance period. (R4, tab D-11) The government found the 9 October 2006 request without merit on 20 October 2006 (R4, tab D-12).

20. In an 18 December 2006 letter, AAC complained about the government's failure to resolve its request for a time extension and/or entitlement to acceleration costs (R4, tab D-15).

21. Appellant asked for a contracting officer decision on the time extension request on 15 October 2007 (R4, tab D-17). A government attorney responded with a request that appellant submit a formal claim (R4, tab D-18).

22. By submission dated 19 November 2007, AAC filed a claim for a 31-day time extension and requested a contracting officer final decision (R4, tab D-19). The contracting officer issued a final decision denying AAC's claim on 12 February 2008 (R4, tab A).

23. AAC filed a timely appeal on 22 February 2008. The appeal was docketed as ASBCA No. 56325.

24. Citing the schedule in the RFP, FAR 52.211-10, Amendment No. 0001 to the RFP, the contract's time extension clause, government internal schedules and, apparently, other government "superior knowledge," appellant's complaint contends that the government had an obligation "to award [the] contract on March 29, 2006 or earlier by facsimile and accept facsimile copies of the bonds for purposes of issuing NTP, and issue NTP on March 30, 2006." Because the government did not send the NTP on 30 March 2006, it owed AAC a 31 day time extension. (Compl. ¶¶ 9-10)

25. The government has filed a motion for summary judgment and AAC has filed a cross-motion for summary judgment.

DISCUSSION

The Government's Motion for Summary Judgment

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Lockheed Martin Aircraft Center*, ASBCA No. 55164, 08-1 BCA ¶ 33,832. The government says that appellant asserts that it had a guaranteed start date of 30 March 2006 based on language in the RFP. The government then argues that principles of contract interpretation make it clear that that language cannot be interpreted to promise that start date.

The language cited by the government is from § 00100 of the solicitation which required a proposed schedule and said that "[f]or proposal development purposes only, the start date shall be 30 March 2006" (SOF ¶ 6). The government says that AAC's claim that it should have received an NTP by 30 March 2006 is based on the quoted language. It then contends that the language did not guarantee a start date. The problem with the argument is that appellant does not assert a guaranteed start date and does not rely solely on the quoted language. Rather, for one thing, AAC points to the government's alleged refusal to adjust milestones when the NTP was not issued on the assumed start date.

Further, while some of appellant's early requests for a time extension cite the RFP language, its primary claim, as we understand it, is a superior knowledge claim. AAC says that the government withheld information relating to both the difficulties appellant would face in meeting the contract milestones and the fact that it was not likely to receive additional time to meet the milestones. That meant, AAC argues, that it was incumbent on the government to issue an NTP by at least 30 March 2006. This argument would be available to appellant whether or not the RFP contained the language quoted above. Because appellant's position is not solely based on the RFP language, the government's motion, which is based on interpreting that language, is without merit. The government is not entitled to judgment as a matter of law and its motion must be denied.

Appellant's Cross-motion for Summary Judgment

AAC's cross-motion is based on a statement in the government's memorandum in support of its motion for summary judgment. Appellant says the government agreed that it had to issue the notice to proceed so that AAC received all the time allocated by the contract. Appellant then calculates the time allowed for various RFP and contract milestones based on 30 March 2006 and 1 May 2006 start dates and concludes that it received less time than it should have for fabrication and delivery of the RSW. AAC has not shown that summary judgment is appropriate.

The language appellant relies upon is the following:

Upon reading SF 1442 Block 11 in conjunction with both SF 1442 Block 12 and FAR 52.211-10, it is clear that while SF 1442 allowed the Corps 60 days to evaluate the offers, the Corps also was bound by FAR 52.211-10 and SF 1442 Block 12 to issue the NTP so that AAC had 345 days within which to complete the fabrication and installation of the RSW by April 13, 2007 and 90 days thereafter to support Government testing. In order for the Corps to meet its obligations, it needed to insure [sic] issuance of NTP by May 4, 2006 so that the full performance period would be available to AAC.

(Gov't mot. at 14) AAC interprets this to mean that the government agreed and admitted that it "had the 'obligation' to issue NTP at a time that allowed AAC the full period for contract performance" (app. opp'n at 22). This interpretation is inconsequential at best. In the first place, it is not remarkable for the government to state that a contractor should receive all of the time allowed by a contract.

Secondly, it is clear that appellant reads more into the government's statement than is actually there. The government has not admitted that the contract required an NTP date of 30 March 2006. Further, it does not appear that, in the statement relied upon, the government agreed or admitted anything with respect to the milestones set out in ¶¶ 1.4 and 1.6 of FAR 52.211-10.*

The parties clearly differ on the requirements of the contract and the allegation relating to superior knowledge. We find the existence of genuine issues of material fact. Appellant is not entitled to judgment as a matter of law.

Additionally, appellant's complaint requests the following: "Appellant demands an award of 31 days of contract time plus its attorney fees under the Equal Access to Judgment [sic] Act."

The Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a)(2), provides, in pertinent part, that "[a] party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section...."

Appellant's request for attorney's fees at this stage in the proceedings is premature and thus not properly before the Board. *Maintenance Engineers, Inc.*, ASBCA No. 34431, 87-2 BCA ¶ 19,915; *J.M.T. Machine Co.*, ASBCA Nos. 23928, *et al.*, 86-2 BCA ¶ 18,928, *aff'd*, 826 F.2d 1042 (Fed. Cir. 1987). Moreover, a complaint is not the proper vehicle for asserting entitlement to relief under the EAJA. *Huntington Construction, Inc.*, ASBCA Nos. 33525, 33526, 87-2 BCA ¶ 19,741; *J.M.T. Machine Co.*, *supra*; *Superb Maintenance Service, Inc.*, ASBCA No. 29905, 85-1 BCA ¶ 17,859.

If appellant subsequently qualifies as a prevailing party otherwise eligible under the EAJA, appellant may file a proper application.

CONCLUSION

For the reasons set out above, the government's motion for summary judgment and appellant's cross-motion for summary judgment are denied.

* We note that the government interprets the 435 days allowed for contract completion (SOF ¶ 8) to be divided into 345 days for fabrication and installation and a separate 90 days for support of government testing of the RSW. That division was not important to the government's motion and appellant accepted the division for purposes of its cross-motion. We do not decide in this opinion whether the contract period was intended to be partitioned in that manner.

Dated: 8 June 2009

PAUL WILLIAMS
Administrative Judge
Chairman
Armed Services Board
of Contract Appeals

I concur

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

OWEN C. WILSON
Administrative Judge
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. 56325, Appeal of Advanced American Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

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