

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
BECO Construction Co., Inc.) ASBCA No. 57483
)
Under Contract No. W9128F-10-P-0074)

APPEARANCE FOR THE APPELLANT: Mr. Doyle Beck
President

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
James M. Pakiz, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Omaha

OPINION BY ADMINISTRATIVE JUDGE JAMES

BECO Construction Co., Inc. (BECO) timely appeals from the contracting officer's (CO) 14 October 2010 decision that denied BECO's \$20,808.58 claim submitted in September 2010. On 10 February 2011 BECO elected the Board Rule 12.3 accelerated procedure. The parties elected to have the appeal decided upon the written record under Board Rule 11. The record includes the pleadings, the Rule 4 files, rebuttal evidence and the parties' briefs. Appellant's 11 April 2011 discovery requests and respondent's 28 April 2011 replies thereto, which the Board requested on 7 June 2011, are added to the Rule 4 file at tabs 15 and 16. The Board has jurisdiction of the appeal under the Contract Disputes Act of 1978, 41 U.S.C. §§ 7105(e)(1)(A), 7106(a). We decide entitlement only (Bd. order dtd. 9 February 2011).

SUMMARY FINDINGS OF FACT

1. On 17 June 2010 the U.S. Army Corps of Engineers (COE), Omaha District, issued Request for Quotations No. W9128F-10-T-0041 (RFQ 41) for Thistle Tails Final Reclamation, Madison County, Montana (R4, tab 14a at 1, 3).

2. RFQ 41's "Scope of Work" stated:

Introduction:

The Bureau of Land Management...approved a Plan of Operation...to remove approximately 14,000 tons of historic

mill tails located on approximately 2.7 acres near the old ghost town of Rochester, Madison County, Montana. The approved plan did not include reclamation. The general scope of this contract is to complete reclamation by replacing topsoil to cover the site and seed it.

History:

Berms along the south and east edges of the site were constructed of native soil to retain tailings in the impoundment. During the tailings removal some native topsoil adjacent to the impoundment was pushed aside into small, approximately 3' high berms along the upside slope of the project area. An approach accessing the site across Rochester Creek from the adjacent county road was constructed to facilitate tailings removal. Tailings were removed in 2008/2009.

Proposed Action:

To complete reclamation of the tailings removal area in the summer of 2010. Work includes the following:

- Redistribute topsoil in berms over the adjacent tailings removal area.
- Topsoil on adjacent sidehill is to be graded to match natural contour....
- A small, 3' high berm is to be left between the reclaimed area and Rochester Creek and along the downslope side of the reclaimed area to function as a barrier to trap any potential residual contaminants.
- Soil from the 3' berms is to be graded, sloping back towards the reclaimed area at a slope between 2% and 33%.

....

- Once the site has had topcover replaced, the topcover will be slightly scarified. Once all scarification is completed, the area will be seeded with an approved

seed mix (see below). Seeding will be accomplished with a drill....

- Seed disturbed area with native, certified weed free seed....
- The entrance to the site will be scarified as necessary to relieve any compaction that may have occurred from hauling. The entrance road will be seeded.... Positive flow will be insured in the dry creek drainage in the event a large meteoric event should occur....
- Once the site is seeded...some medium to large rocks will be...placed at the entrance to the site....

(R4, tab 11 at 3-4)

3. RFQ 41 stated: “NOTE: PLEASE SEE ATTACHED DRAWINGS FOR FURTHER INFORMATION REGARDING THIS CONTRACT” and included a topographic map showing the site location and two maps respectively entitled “Thistle Site Orientation Map” and “Thistle Site Scope of Work,” each of which included the following disclaimer (R4, tab 14a at 4 of 33, tab 14b at 1-3):

Map Compiled: 28 April 10

This map is intended for display purposes only. No warranty is made by the Bureau of Land Management as to the accuracy, reliability, or completeness of these data for individual or aggregate use with other data, or for purposes not intended by the BLM. This map may not meet National Map Accuracy Standards. This product was developed through digital means and information may be updated without notification.

The BLM maps showed an irregular elliptical area, having no designated acreage, with the note “Tailings removed area to be capped, contoured and seeded.” Varying colors were applied to the irregular area, with no color code explanation. (R4, tab 14b at 2-3)

4. RFQ 41 did not incorporate the FAR 52.236-3 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984) clause (R4, tab 14a at 7 of 33). The COE did not measure the Thistle Tails site; it determined its size from aerial maps and existing drawings (R4, tab 16 at 12 of 35). The COE estimated a \$51,995 contract cost

and a site exceeding 5 acres on 17 June 2010 (R4, tab 16 at 33-34 of 35). COE's acreage estimate was not disclosed to BECO (or other bidders, if any).

5. In preparing its quotation, BECO interpreted RFQ 41's Scope of Work terms for the redistribution, contouring and sloping of berms to be done on the 2.7 acre project area or site, except for reclaiming and seeding the site access road. BECO interpreted the Thistle Site Orientation Map notes on berms and side-cast material to be included in the 2.7 acres, because the map scale could not be verified by measuring a landmark "such as a fence" (which was not shown) and the map disclaimed accuracy, reliability or completeness. (Supp. R4, tab S-1 at 1-4) We find that BECO relied upon and was misled by RFQ 41's representation that the site was approximately 2.7 acres.

6. On about 8 July 2010 CO Lee McCormick, and on 13 July 2010 BECO's Doyle Beck, signed Contract No. W9128F-10-P-0074 (contract 74) for the fixed price of \$34,711.00. Contract 74's clauses matched those in RFQ 41 and required contract completion by 18 September 2010. (R4, tab 11 at 1, 2, 5, tab 14a)

7. On 30 July 2010 BECO received notice to proceed on contract 74 (R4, tab 9).

8. On 10 August 2010 BECO walked the perimeter of the site, utilizing a Garmin handheld GPS device to calculate the area, excluding the approach. BECO determined that the work site consisted of over 4 acres, based on the Scope of Work contained in contract 74. (Supp. R4, tab S-1 at 4, 10)

9. During a 13 August 2010 preconstruction meeting, BECO's D. M. Anderson first voiced concern to the COE over the size of the work site, alleged a change in the work area size and requested a \$16,584.14 contract price change (from \$34,711.00 to \$51,295.14) (supp. R4, tab S-1 at 10-11; R4, tab 8).

10. The 18 August 2010 letter of Andrew Reckmeyer, the CO's representative, to BECO stated that no contract price change was warranted (R4, tab 8).

11. BECO's 23 August 2010 letter to Mr. Reckmeyer stated: "Measurements as presented at the 13th of August pre-construction meeting remain valid. The acreage will be measured when project is completed." (R4, tab 7)

12. BECO's 9 September 2010 letter to Mr. Reckmeyer stated that it completed the contract on 1 September 2010, measured the "final area" by GPS at 4.3186 acres, and attached an invoice for \$55,519.58 (R4, tab 6 at 1-3). Mr. Reckmeyer's 17 September 2010 reply to BECO rejected its \$55,519.58 invoice because it exceeded the contract amount (R4, tab 5). Respondent paid BECO \$34,711.00 for performance of contract 74 (supp. R4, tab S-1 at 11).

13. BECO's 20 September 2010 letter submitted a claim to CO McCormick for \$20,808.58 based on "implied warranty" under the *Spearin* doctrine and "constructive change order" and requested the CO's decision within 60 days (R4, tab 4). The CO's 14 October 2010 decision denied BECO's claim (R4, tab 3). BECO received that decision on 19 October 2010 (compl., attach. at 9). BECO timely appealed from that decision to the ASBCA by letter dated 11 January 2011 (R4, tab 1).

DECISION

BECO argues that the contract Scope of Work misled it to believe that the work site was "warranted" to be 2.7 acres, whereas BECO measured, reclaimed and seeded an area of 4.3186 acres, entitling it to a price adjustment for a constructive change or under the *Spearin* doctrine. The government argues that it only mentioned the 2.7 acres as background information. It states that it specified the site in terms of the areas to be reclaimed and seeded in the vicinity of the tailings area; it did not change the site area after issuing the RFQ; and the site area could be determined as BECO did on 10 August 2010 by measuring the work site's area by a GPS device and determining that the work site exceeded 4 acres based on the contract Scope of Work.

The rule is well established that where the government makes positive statements in the specifications or drawings for the guidance of bidders, a contractor has the right to rely on them regardless of contractual provisions requiring the contractor to make investigations. *Arcole Midwest Corp. v. United States*, 125 Ct. Cl. 818, 822, 113 F.Supp. 278, 280 (1953); *Hollerbach v. United States*, 233 U.S. 165, 171-72 (1914) (notwithstanding a clause requiring bidders to visit the site and make their own estimates of the difficulties in performing the work, a positive representation in the contract specifications that the existing dam was backed by broken stone, sawdust and sediment, must be taken as true and binding on the government).

When a contract specification understated the acreage of work to be performed, and the contractor relied on and was misled by the specified acreage, it was entitled to an equitable adjustment for the added work it performed. *See E. L. Hamm & Associates, Inc. v. England*, 379 F.3d 1334, 1338-39 (Fed. Cir. 2004).

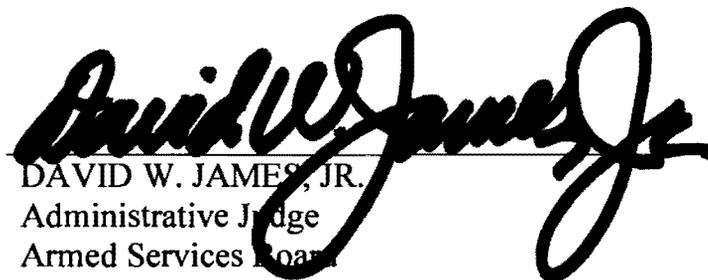
In the instant appeal, the *Arcole/Hollerbach* rule applies, *a fortiori*, because RFQ 41 included no FAR 52.236-3 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK clause (finding 4), and nothing about the Thistle Tail site maps suggested that the irregular elliptical area was not approximately 2.7 acres, as specified in the contract's Scope of Work (findings 2, 3). BECO interpreted the Scope of Work and the site maps to require reclamation, including redistribution, contouring and sloping of berms to be done on a 2.7 acre project site, except for reclaiming and seeding the site access road. BECO relied upon and was misled by the solicitation's representation that the site was approximately 2.7 acres. (Finding 5) Concurrent with the issuance of RFQ 41, the COE

estimated that the contract work site exceeded 5 acres, but did not disclose that information to BECO (finding 4). The government knew, or surely had reason to know, that the specified acreage was erroneous before BECO submitted its quotation and the contract was awarded, and that BECO did not know of that error.

The government's arguments are unsound. While it issued no express, written change order to enlarge the site, its misleading solicitation provision about the 2.7 acres had the same effect. *See E. L. Hamm*, 379 F.3d at 1339. RFQ 41 did not require or invite BECO to investigate and measure the site area, as the FAR 52.236-3 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK clause would have done (finding 4). The fact that after award in August 2010, BECO measured the site by a handheld GPS device (finding 8), does not mean that BECO had the pre-award duty to do so. *See Hollerbach*, 233 U.S. at 172.

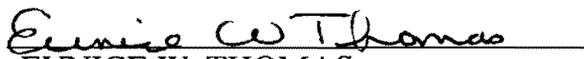
We hold that BECO is entitled to compensation for the increased acreage it reclaimed and seeded other than the site access road. We grant the appeal, and remand the appeal to the parties for resolution of quantum.

Dated: 4 August 2011



DAVID W. JAMES, JR.
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. 57483, Appeal of BECO Construction Co., Inc. rendered in conformance with the Board's Charter.

Dated:

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