

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Hensel Phelps Construction Co. ) ASBCA No. 49716  
 )  
Under Contract No. DACA47-94-C-0022 )

APPEARANCE FOR THE APPELLANT: Lester C. Cannain, Esq.  
Albuquerque, NM

APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.  
Engineer Chief Trial Attorney  
Dennis A. Wallace, Esq.  
Engineer Trial Attorney  
U.S. Army Engineer District,  
Albuquerque

OPINION BY ADMINISTRATIVE JUDGE WILLIAMS

Hensel Phelps Construction Company (HPCC or appellant), on behalf of its subcontractor, Commercial Enterprises, Inc. (Commercial), seeks an equitable adjustment for additional costs allegedly incurred due to a defective Government design for the furnishing and installation of metal wall liner panels (MLP). A hearing was held. Only the issue of entitlement is before the Board.

FINDINGS OF FACT

1. In February 1994, respondent, acting through the U.S. Army Engineer District, Albuquerque, issued an Invitation For Bids (IFB) for the construction of a laboratory (Laboratory) at Kirtland Air Force Base, New Mexico (R4, tab C1).

2. The general provisions of the contract contained the standard Federal Acquisition Regulation (FAR) construction clauses, including DISPUTES (DEC 1991) (FAR 52.233-1), and CHANGES (AUG 1987) (FAR 52.243-4) (R4, tab C2).

3. The contract also contained the standard clause SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984), (FAR 52.236-21), 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. . . .

(R4, tab C2 at 91)

4. The contract special clauses included CONTRACT DRAWINGS, MAPS, AND SPECIFICATIONS (DEC 1991) (DFARS 252.236-7001), 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 C3 at 88)

5. The specifications at Section 07413, METAL ROOFING AND SIDING, PLAIN provided, in relevant part:

#### 1.2 DESIGN REQUIREMENTS

Contract drawings indicate the design loads and the extent and general assembly details of the metal roofing and siding. . . .

. . . .

#### 2.1 ROOF AND WALL PANELS

Panels shall be steel . . . .

. . . .

#### 2.5 WALL LINERS

Wall liners shall be 0.018-inch thick minimum for steel of composition specified for covering, and . . . shall extend from floor to a height shown in the drawings. . . .

....

### 3.1 INSTALLATION

Installation shall be as specified and in accordance with the approved erection instructions and drawings to produce weather tight structure. . . . Liner panel to be installed at interior as scheduled.

(R4, tab C4)

6. Among 173 pages of contract drawings were included:

a. Sheet No. A10 of 41, Sequence No. 31, entitled “Room Finish Schedule and Partition Types,” which depicts a room finish schedule, lists the finish abbreviations, and has section drawings of the various partition types (R4, tab C5)/

b. Sheet No. A20 of 41, Sequence No. 41, entitled “Wall Sections,” which depicts wall sections to scale (R4, tab C7).

c. Sheet No. A25 of 41, Sequence No. 46, entitled “Section Details,” which shows section details (R4, tab E3).

d. Sheet No. A26 of 41, Sequence No. 47, entitled “Plan Details,” which depicts plan view sections and other miscellaneous details (R4, tab E4).

7. The project specifications and drawings had been designed by a private architect and engineering firm employed by respondent. Corps representatives, including engineers, architects and the construction project manager, reviewed the specifications and drawings, and their technical reviews were incorporated into the IFB, which consisted of over 1,500 pages. No conflicts between the Room Finish Schedule and Partition Types drawings and the other drawings were noted. (Tr. 1/136-43, 2-7; exs. A-9, -10)

8. Mr. Mark Watson was the lead estimator for appellant, the general contractor. He and approximately five assistants prepared appellant’s bid. Appellant, as a general contractor, requested bids from potential subcontractors, including Commercial. Appellant’s bid was in large part based upon subcontractors’ bids since 80 to 90 percent of the value of work, including finish work, would be done by subcontractors. (Tr. 1/25-26, 29, 31-32, 49) According to the lead estimator, information from the room finish schedule and other IFB documents would be needed to establish a bid for the MLP work (tr. 1/52-53).

9. Initially, Commercial's bid work focused on the steel framing and drywall. On the day that bids were due, *i.e.*, 22 March 1994, HPCC asked Commercial to look at the MLP in Section 07413 (tr. 1/184-85). When preparing Commercial's MLP bid for HPCC, Mr. Patrick Arrington, a certified professional construction estimator, went first to the specification for metal liner panels, then he went to the room finish schedule and its legend, then he went down the room numbers and all the walls that called for metal liner panels to get their height, and finally he went to floor plans to get the length and square footage, or quantity of area, of liner panels. He arrived at a figure of 30,000 square feet. Knowing that some material would be used for fabrication or wasted, he finally estimated 36,804 square feet of MLP material. He used only four of the 173 drawings to arrive at his MLP estimate because the others "didn't add anything," were "very confusing," or "didn't show the clarity." Notwithstanding that he began on the day that bids were due and that his estimate was a "quick process," he believed he had sufficient time to get the requirements for the MLP and prepare his bid. (R4, tabs C4, C5; tr. 1/64-85, 93-105, 176-82, 184-87; exs. A-4 through -6) There was only a 4-1/2 percent difference between the Government estimate of 35,046 square feet and his estimate of 36,804 square feet of MLP material (exs. A-7, -12; tr. 1/175-76).

10. The contract was awarded to appellant on 13 April 1994 (R4, tab C1). During construction, Commercial's field supervisor advised Mr. Arrington that there was a mistake in the MLP finish schedule which conflicted with other contract specifications (tr. 1/107). By Information Request No. 239, dated 7 March 1995, HPCC requested clarification of the room finish schedule found in Sequence No. 31 for rooms numbered 144, 148, 149, 158, 159, and 161 which called for a finish on the walls consisting of concrete masonry units (CMU), while other sections showed these same walls to be stud walls with metal liner panels. The Government replied that "the finish schedule is incorrect. Section 3/A19 @ Rms 144, 148 & 149, and Section 1/A20 @ Rms 158, 159 & 161 clearly indicate stud walls with metal liner panels. Since the walls are not CMU, a CMU finish makes no sense." (R4, tab D3)

11. In a letter dated 15 March 1995 to HPCC from Commercial, Mr. Arrington stated that he agreed with the Government that the room schedule was incorrect and that "[p]rior to bid, [Commercial] asked the contracting officer about the conflicting details, and [they] were told to 'bid it like you see it'" (R4, tab D5). Ms. Theresa Armijo was the contract specialist on the Lab project for the Albuquerque District Engineers. She testified, and the record supports her, that no pre-bid inquiries received from potential contractors raised any question regarding the MLP, and no bidder sought clarification of the specifications and drawings regarding the MLP requirements. (Tr. 1/119, 144-51; ex. A-11) Given the lack of specificity in Commercial's letter to HPCC as to date, mode, or to whom the alleged inquiry was made, the lack of any contemporaneous record, Ms. Armijo's testimony, and the short time between when Commercial began preparing

its bid and the time bids were due, we give no credence to appellant's assertion that pre-bid clarification was sought.

12. By letter dated 4 April 1995, the Government directed appellant to provide the metal liner panels in question (R4, tab D10). Appellant's subsequent claim for additional compensation of \$63,556.00 was denied by the contracting officer (R4, tab B).

13. Ms. Elaine M. Johnson, the Government's project manager and contracting officer representative on the contract, testified that the finish schedule and the metal liner specifications would not be sufficient to determine MLP requirements. A proper sequence would require an understanding of the floor plans, a comparison of the floor plans with their wall sections, and a final check with the finish schedule, which would establish the total MLP requirement. (R4, tab C5; ex. G-3; tr. 2/6, 13, 21-29) Mr. Arrington testified for appellant and identified areas of disagreement with Ms. Johnson's analysis (tr. 2/53-58, 61). While conceding that Ms. Johnson followed a very systematic method in figuring out the areas requiring MLP, he was in a "cost competitive mode" and not a "designer" which was left to the A&E and Corps to do. "So . . . [he] followed the room finish schedule explicitly." (Tr. 2/59-60) He did not have "any indication that there were additional areas." Had there been "indications on the room finish schedule of multiple finishes, [he] would have followed her analysis . . . but it certainly didn't stir any question in [his] mind at the time of bid." (Tr. 2/62) We find a prudent contractor would have followed the systematic sequence outlined by Ms. Johnson.

### DISCUSSION

The evidence indicates, and the parties agree, that the finish schedule and the drawing plans and sections were inconsistent from the time of their issuance. Appellant looks to the room finish schedule and emphasizes the importance it plays in bidding work by finish subcontractors. On that basis, it asserts that its bid was based on specification section 07413, at 3.1, which stated, "Liner panel to be installed at interior as scheduled"; therefore, it properly relied on the finish schedule to establish the MLP requirements. Appellant also contends the evidence establishes appellant's reliance on its interpretation at bid time and that, because no one discovered the defective specification during the pre-bid period, the difference amounted to a latent ambiguity. Appellant also notes the minor square footage difference between its estimate and that of the Government for MLP material. Appellant thus concludes there was no duty of inquiry before bidding. Similarly, it does not believe it should have the risk of the Government's admitted finish schedule errors.

Appellant assumed the risk of any patent ambiguity in the specifications when it chose not to review all of the documents prior to submitting its bid. "It is the existence

and type of discrepancy or omission, not necessarily the contractor's actual knowledge of it that imposes a duty to inquire." *Transco Contracting Co.*, ASBCA No. 25315, 82-1 BCA ¶ 15,516 at 76,973. While the parties agree that the provisions regarding the room finish schedule were in error, the ambiguity was readily apparent prior to bidding time since the drawings appellant failed to review show that the affected rooms required stud walls with metal liner panels. A reasonable contractor would have perceived the inconsistency among the contract terms. Appellant then had an obligation to seek clarification of the acknowledged ambiguity before bidding. *Triax Pacific, Inc. v. West*, 130 F.3d 1469, 1475 (Fed. Cir. 1997); *Metric Construction Company*, ASBCA No. 31750, 86-3 BCA ¶ 19,034. Failure to make such inquiry requires that a patent ambiguity be resolved against the contractor. *Triax Pacific*, 130 F.3d at 1475. That is so "even if the contractor's interpretation is reasonable and relied upon." *Dante's Constr., Inc.*, ASBCA No. 36099, 90-2 BCA ¶ 22,720 at 114,063.

The appeal is denied.\*

Dated: 3 May 2000

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PAUL WILLIAMS  
Administrative Judge  
Chairman  
Armed Services Board  
of Contract Appeals

(Signatures continued)

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\* We have also fully considered the other issues and arguments raised by appellant, and find them to be without merit.

I concur

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MARK N. STEMLER  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I concur

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DAVID W. JAMES, JR.  
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. 49716, Appeal of Hensel Phelps Construction Co., rendered in conformance with the Board's Charter.

Dated:

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