

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Shah Construction Company, Inc.) ASBCA No. 50411
)
Under Contract No. DACA21-94-C-0033)

APPEARANCE FOR THE APPELLANT: Leonard W. Childs, Esq.
Childs & Lewis
Savannah, GA

APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.
Engineer Chief Trial Attorney
Susan K. Weston, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Savannah

OPINION BY ADMINISTRATIVE JUDGE DICUS
ON RESPONDENT’S MOTION TO DISMISS
AND MOTION FOR SUMMARY JUDGMENT

This appeal is taken from a contracting officer’s final decision denying appellant’s claim for an equitable adjustment of \$80,098.76. The underlying contract is for construction of concrete ammunition magazines (igloos) and related work at Fort Stewart, Georgia. Asserting that there are no material facts in dispute and that it is entitled to judgment in its favor as a matter of law, the Government has filed a motion for summary judgment. Its motion to dismiss is actually a motion for sanctions. Appellant opposes the motions. We deny the Government’s motions.

FINDINGS OF FACT

The following findings are solely for the purpose of resolving the motions.

1. In 1994, Shah Construction Company, Inc. (appellant or Shah), entered into Contract No. DACA21-94-C-0033 with the United States Army Corps of Engineers, Savannah District (Government) to expand the ammunition supply point at Fort Stewart, Georgia, for the firm fixed-price of \$3,538,400. The contract required the construction of ten igloos. (R4, tab 4) Shah subcontracted the work that is at issue here to the Polote Corporation (Polote), the only bidder on that work (R4, tab 10; affidavit of Anil C. Shah (Shah aff.)).

2. The contract contained the SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984) clause at FAR 52.236-21, which provides, in pertinent 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.

. . . .

(c) Where “as shown”, “as indicated”, “as detailed”, or words of similar import are used, it shall be understood that the reference is made to the drawings accompanying this contract unless stated otherwise.

(R4, tab 6E)

3. Specification section 02962, JUTE MATTING AND OPEN WEAVE FABRIC FOR EARTH DITCH AND SLOPE PROTECTION, states in relevant part:

1. DESCRIPTION OF WORK: This section covers the placement of jute matting in ditches and on slopes to prevent erosion, and the placement of open weave fabric on slopes to hold mulch, complete.

2. MATERIALS:

2.1 Open Weave Fabric and Staples: For securing mulch placed on slopes under SECTION: GRASSING - SEEDING FOR ROADWAY AND EMBANKMENTS IN OUTLYING AREAS, open weave fabric shall be used consisting of onion sacking, nonmetallic erosion net cloth or similar approved material. Mesh of the fabric may vary from approximately 1/4 inch to 4 inches in size. Staples shall be No. 9 or No. 10 wire and fabricated as shown.

2.2 Jute Matting and Staples: To prevent erosion in ditches and on slopes, jute matting shall be used as indicated. The jute matting shall be of open weave, single jute yarn averaging 190 pounds per spindle of 14,400 yards. . . .

....

4. APPLYING OPEN WEAVE FABRIC ON MULCHED SLOPES:
After sprigging, overseeding, and mulching have been completed in accordance with SECTION: GRASSING - SEEDING FOR ROADWAY AND EMBANKMENTS IN OUTLYING AREAS, open weave fabric shall be applied to the slopes as indicated. The placement of the open weave fabric shall closely follow the mulching operations for each individual area. . . .

5. JUTE EROSION CONTROL MATTING:

5.1 General: Jute erosion control matting in ditches and on slopes shall be constructed in the areas shown. . . .

(R4, tab 6A)

4. Specification section 02221, EXCAVATION, FILLING AND BACKFILLING FOR BUILDINGS states, at subparagraph 3.14.2.1 “Placement Adjacent to Igloos:”

After the concrete arch and walls have been waterproofed and dampproofed as specified, earth cover shall be provided as indicated. . . .

(R4, tab 6D, ¶ 3.14.2.1)

5. The sedimentation and erosion control plan for the project is depicted in the drawings. Drawings P-17 and P-18 show the plan for the roadways whereas P-19 and P-20 show the plan for the ammunition igloos and the surrounding areas. The drawings each contain a legend. The legend shows symbols that depict “limit of seeding and mulching” and “disturbed area stabilization with permanent seeding” in the drawing. Drawing P-21 is a detail plan for the igloos. (R4, tab 7)

6. Drawings P-19 and P-20 depict what is labeled “EROSION CONTROL MAT” and contain a cross-hatching symbol for “EROSION CONTROL MAT” which covers the ten igloos (R4, tab 7).

7. Drawing P-21 depicts a cross section of an igloo’s exterior details. In the middle of the drawing are the words “SLOPE PROTECTION.” The drawing is a side detail

of the earth mound over an igloo. Adjacent to the mound, and oriented to the mound by a straight-line arrow, are the words:

BACKFILL ONLY AFTER CONCRETE WALL AND ARCH CONSTRUCTION IS COMPLETE AND CONCRETE HAS CURED A MINIMUM OF 28 DAYS. COMPACT SOIL IN ACCORDANCE WITH SECTION 02221 OF THE SPECIFICATIONS. BACKFILLING SHALL BE COMPLETED SIMULTANEOUSLY ON EACH SIDE WITH A DIFFERENCE IN HEIGHT NOT GREATER THAN 2'0" FROM SIDE TO SIDE.

(R4, tab 7)

8. Drawing P-21 depicts erosion control matting under four to six inches of topsoil on top of an igloo. The matting overlapped 2 inches at the edges and was secured by wooden stakes. A cross section titled "SLOPE PROTECTION," notes with an arrow drawn to the matting: "THREE DIMENSIONAL GEOMATRIX OF NYLON EROSION CONTROL MATTING (8.0 OZ/SQ. YD) 0.014 DIA. FILAMENTS HEAT BONDED WITH 23 CARBON BLACK BY WEIGHT." (R4, tab 7)

9. Polote reviewed specification section 02962 and drawings P-19, P-20 and P-21 regarding the erosion control requirements (3 September 1998 affidavit of Benjamin Polote, Sr. (Polote aff. No.1) ¶¶ 9-12). In preparing its bid to submit to Shah, Polote noted that the drawings contained a detail that listed nylon matting. According to Polote, the diagram was confusing and failed to indicate where the nylon matting was required in conjunction with the work. Polote determined that drawing P-21 contained internal conflicts, incapable of reconciliation, and so relied on the contract specifications for the matting material requirement. (Polote aff. No.1, ¶ 15) Considering the matter minor in the overall context of the project, Polote did not seek clarification of the erosion control matting directions found on drawing P-21 (Polote aff. No.1, ¶ 18). According to Polote, it included jute matting for erosion control in its subcontract bid, but omitted nylon matting (Polote aff. No.1, ¶¶ 21 and 29).

10. On or about 13 June 1994, appellant submitted a proposal to the contracting officer's representative for approval to use jute matting to cover the ammunition igloos. The Government rejected the request for approval and directed appellant to use nylon type matting on the igloos. (R4, tab 8)

11. Appellant, asserting that the Government modified the contract by insisting on the nylon matting, submitted a certified claim to the contracting officer in the amount of \$61,572.54 on 9 October 1995. After receiving additional information from Polote, appellant amended its claim by letter dated 14 November 1995 and increased the amount of its claim to \$80,098.76. (R4, tab 3) The contracting officer issued his decision

denying the claim on 11 September 1996 (R4, tab 2). Appellant timely appealed the contracting officer's decision to the Board on 9 December 1996 (R4, tab 1).

12. Appellant has not produced Polote's or Shah's bid documents to support the estimate for the work at issue (resp. mot. at 5; app. resp. at 1).

DECISION

The Summary Judgment Motion

Summary judgment is appropriate where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which will affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Inferences must be drawn in favor of the party opposing summary judgment. *Hughes Aircraft Co.*, ASBCA No. 30144, 90-2 BCA ¶ 22,847. The nonmovant may not rest on its conclusory pleadings, but must set out, in affidavit or otherwise, what specific evidence could be offered at trial. Failing to do so may result in the motion being granted. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624 (Fed. Cir. 1984). The party with the burden of proof must support its position with "more than a scintilla of evidence." *Walker v. American Motorists Insurance Co.*, 529 F.2d 1163, 1165 (5th Cir. 1976). Appellant here has the burden of proof that the Government's direction to use nylon matting for erosion control over the igloos was not required by its contract and thereby constructively changed the contract. *Teledyne McCormick-Selph v. United States*, 588 F.2d 808, 810 (Ct. Cl. 1978).

Appellant contends that there was an irreconcilable internal conflict in drawing P-21 and that it was therefore proper for it to rely on the specifications as controlling. Appellant supports its contention of reliance with the affidavits of Mr. Shah and Mr. Polote (findings 1, 9) and argues that the order of precedence in the SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION clause supports its right to rely on the specifications. Respondent contends that appellant has conceded it cannot produce bid documents to support its position and that appellant cannot meet its burden of proof through testimony alone.

Respondent has cited decisions of this Board to support its argument that appellant cannot prove reliance without documentary evidence. However, we believe respondent has misconstrued the cases cited.* All of the decisions were after a hearing had been held

* *Bodell Construction Company*, ASBCA No. 38355, 92-1 BCA ¶ 24,433; *ACS Construction Company, Inc.*, ASBCA Nos. 28193, 28666, 86-1 BCA ¶ 18,627; and *Malloy Construction Co.*, ASBCA No. 25055, 82-2 BCA ¶ 16,104.

and, thus, do not address summary judgment motions. The Board considered the testimony and found it wanting, but did not hold that, as a matter of law, documentary evidence of reliance was required to sustain the appeal. Moreover, reliance is a question of fact. In this appeal, it is outcome determinative and, therefore, material. Since the parties are in dispute about reliance, summary judgment is inappropriate. *Information Systems & Networks Corp. v. United States*, 34 Fed. Cl. 457 (1995). Accordingly, we deny respondent's summary judgment motion.

The Motion to Dismiss

Board Rule 35, Sanctions, provides:

If any party fails or refuses to obey an order issued by the Board, the Board may then make such order as it considers necessary to the just and expeditious conduct of the appeal.

Respondent's dismissal motion argues that appellant should not be allowed to continue with this appeal since it has conceded it cannot produce documentary evidence relevant to its alleged interpretation. Respondent's motion recognizes that the elements necessary for the sanction of dismissal are not present (resp. mot. at 11). It seeks instead for the Board to draw an adverse inference from appellant's failure to produce bid documents. According to respondent, the bid documents were "at least negligently destroyed" (*id.*). Respondent offers no proof to support its contention that appellant negligently destroyed the documents other than an inference to be drawn from the fact that the documents cannot be produced (finding 12). Moreover, there is no Board order which the appellant has failed or refused to obey. Accordingly, we deny respondent's motion to dismiss, which we have treated as a motion for sanctions.

Dated: 19 June 2000

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

EUNICE W. THOMAS
Administrative Judge
Acting 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. 50411, Appeal of Shah Construction Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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