

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Overstreet Electric Company, Inc.) ASBCA Nos. 51655 and 51823
)
Under Contract No. F33601-97-C-W036)

APPEARANCE FOR THE APPELLANT: Terrence R. Ketchel, Esq.
Fort Walton Beach, FL

APPEARANCES FOR THE GOVERNMENT: COL John M. Abbott, USAF
Chief Trial Attorney
CAPT Robert J. Preston, II, USAF
CAPT Gregory A. Baxley, USAF
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE ELMORE
ON APPELLANT'S MOTIONS FOR RECONSIDERATION

On 28 September 1999, the Board issued its decisions in the above enumerated appeals¹ as follows: ASBCA No. 51654 - sustained and remanded to negotiate quantum; ASBCA Nos. 51655 and 51823 - denied; ASBCA No. 51907 - sustained in part and remanded to negotiate quantum. On 5 November 1999 appellant filed a Motion for Reconsideration of ASBCA Nos. 51655 and 51823. The Government has not filed a response to the motions. Familiarity with the Board's decisions is presumed.

ASBCA No. 51655

Appellant contends the Board's decision:

relating to the condition of the manholes, and specifically the safety conditions present in the manholes focuses on Appellant's contentions relating to a Type II Differing Site Condition, and this aspect of the Board's ruling is not at issue in this Motion for Reconsideration. However, Appellant contends that the Board's decision did not adequately address Appellant's contention that a Type I Differing Site Condition

¹ *Overstreet Electric Company, Inc.*, ASBCA Nos. 51654, 51655, 51823, 51907, 28 September 1999 slip op. (1999 ASBCA LEXIS 142).

and Defective Contract Specifications exist relative to the alleged unsafe manholes.

Appellant's claim of 17 March 1998 identified the non-existent spare duct as the only Type I differing site condition encountered. At finding of fact (FF) 22² the Board concluded "[a]ppellant alleged the non-existent spare duct for the installation of the new cable was a Type I differing site condition. . . . (R4, tab 17)." The Board's decision addressed appellant's appeal from the contracting officer (CO) 18 May 1998 final decision denying appellant's Type I equitable adjustment claim.

Appellant, in its motion for reconsideration, contends the Board's decision failed to address as a Type I differing site condition the alleged unsafe condition of some manholes (M/Hs). A review of the record does not support appellant's allegation that the alleged unsafe condition of some of the M/Hs was a Type I differing site condition.

Appellant, to prevail in a Type I differing site condition claim, must prove: (1) a latent physical condition at the site differed materially from that indicated in the contract; (2) the condition actually encountered were reasonably unforeseeable based on all of the information available to the contractor at the time of bidding; (3) the contractor reasonably relied upon its interpretation of the contract and contract related documents; and (4) the contractor was damaged as a result of the material variation between the expected and unexpected encountered conditions (slip op. at 13). Appellant failed to make a site visit prior to its bid preparation (FF 9), a prerequisite act this Board finds was necessary to prove the alleged unsafe condition of the M/Hs were reasonably unforeseeable at the time of bidding. Appellant has failed to prove condition precedent (2) cited above. Appellant's contention the alleged unsafe condition of some of the M/Hs was a Type I differing site condition is speculation and cannot serve to prove its position. *Zinger Construction Company, Inc.*, ASBCA Nos. 28788, 32424, 87-3 BCA ¶ 20,196 at 102,291; *Gemini Services, Inc.*, ASBCA No. 30247, 86-1 BCA ¶ 18,736 at 94,273.

We look to our original decision to address appellant's contention that the alleged unsafe condition of some of the M/Hs was in some way the result of defective specifications. In our original decision we held that appellant's defective specification contention was an alternative argument to its contention that it encountered differing site conditions; that the argument was based largely on the same factual allegations as the differing site condition contention; and since appellant failed to prove a differing site condition was encountered, its argument that the specifications were defective also fails

² References to findings of fact (FF) refer to the FF cited in the original decision, References to slip op. refer to the pages of the original decision where the cited portion can be found.

for lack of proof (slip op. at 14). Appellant has not provided us with any additional evidence which would cause us to reverse this holding.

The original decision rendered in ASBCA No. 51655, upon review, is affirmed.

ASBCA No. 51823

Appellant contends the Board's decision in ASBCA No. 51823 (see note 1, *supra*) failed to identify the manufacturer of the switchgear and, accordingly, failed to determine if switchgear field testing was a contract requirement. Appellant argues it is entitled to an equitable adjustment based on the interpretations of the specifications reached after the contract was awarded. The Board in its original decisions stated "the issue we must decide is to what extent, if any, appellant was misled by the contract specifications when preparing its bid" (slip op. at 20). It is apparent the rendered original decision was misunderstood by appellant and the Board takes this opportunity to clarify. Based on the facts discussed below the Board had determined that appellant, when preparing its bid, did not give meaning to and harmonize all relevant contract provisions so as to avoid rendering any relevant term superfluous or nugatory (FF 11, 17, slip op. at 18, 21).

Specifications section 01015 and paragraph 1.12, TESTING, stated the contractor retained responsibility for: (1) proving and arranging all required specified tests; (2) furnishing and installing all equipment, appliances, devices and materials and performing all operations necessary to make the project operational; and (3) installing material and equipment in accordance with the recommendations of the manufacturer (FF 3). Mr. Overstreet testified he interpreted specification section 16362A to say no testing was required for acceptance of the switchgear but he recognized during his bid preparation that the need to field test the switchgear was a possibility since the switchgear manufacturer had not yet been chosen (FF 4, 10). Mr. Overstreet, at the time he was preparing his bid, was faced with a patent ambiguity between his interpretation of specification section 16362A and the requirement that the switchgear would be installed in accordance with the manufacturer's instructions, which he testified could require field testing (FF 3, 4, slip op. at 20-21). Mr. Overstreet, faced with a patent ambiguity, was under a duty to seek clarification and failing to do so assumed the risk for an incorrect interpretation. *Totem Construction Company*, ASBCA No 35985, 91-1 BCA ¶ 23,585 at 118,263. There is no question that had clarification been sought this dispute would never have arisen. However, having failed to seek clarification Overstreet is precluded from recovering the alleged incurred additional costs (*id.*).

After a thorough review of the record the original decision rendered in ASBCA No. 51823 is affirmed.

Dated: 7 January 2000

ALLAN F. ELMORE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMLER
Administrative Judge
Acting 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 Nos. 51655 and 51823, Appeals of Overstreet Electric Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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