

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
The Davis Group, Inc.) ASBCA No. 51832
)
Under Contract No. DAKF10-97-C-0034)

APPEARANCE FOR THE APPELLANT: Robert L. Duecaster, Esq.
Manassas, VA

APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA
Chief Trial Attorney
MAJ James A. Lewis, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DICUS

This appeal is taken from a contracting officer's decision denying appellant's claim for \$14,144 and a time extension. The underlying contract is for replacement of doors in family housing at Fort Stewart, Georgia. The parties have elected to waive a hearing pursuant to Board Rule 11. We deny the appeal.

FINDINGS OF FACT

1. Contract No. DAKF10-97-C-0034 was awarded to The Davis Group, Inc. ("Davis" or appellant) on 28 May 1997. The contract was for replacement of doors for the firm-fixed-price of \$380,590. Incorporated by reference were the DISPUTES (OCT 1995) clause at FAR 52.233-1 and the CHANGES (AUG 1987) clause at FAR 52.243-4. (R4, tab 1)

2. The original contract completion date was 14 January 1998 (R4, tab 4). This was unilaterally extended to 7 October 1998. The contract price was increased to \$404,340. (R4, tabs 10, 12, 13)

3. The contract included Technical Exhibit 3 (TE 3), which provided:

THE FOLLOWING DOCUMENTS SHALL BE SUBMITTED TO THE
DIRECTORATE OF CONTRACTING WITHIN THE SPECIFIED TIME
FRAMES.

PARA	TITLE	NOTES
.....		
<u>H.8</u>	Material Approval Submittals	6
.....		

6. Submission and approval requirements are specified on the
Material Submittal List at TE-1.

(R4, tab 1)

4. Clause H.8, MATERIAL APPROVAL SUBMITTALS, provided:

The submittals contemplated by the clause herein
entitled, “Materials and Workmanship” and listed at
Technical Exhibit No. 1 shall be accomplished on FORSCOM
Form 59-2-R, Material Approval Submittal. Any requirement
for the Contractor to submit certificates, manufacturing
brochures, etc., shall be submitted in five copies unless
otherwise specified. Submittals requiring manufacturer’s
certifications must be executed by an officer of the
manufacturing company and notarized. All requested
deviations from the Technical Provisions shall be so noted on
FORSCOM Form 59-2-R, Material Approval Submittal.
Approval of materials or equipment not noted as deviation
shall not relieve the Contractor from complying with the
applicable Technical provisions.

(R4, tab 1)

5. Technical Exhibit 1 (TE 1) provided:

SUBMITTAL LIST

Submittal List for Project No: S2 44-6J

Listed below are contractor submittals required for the above project. The specifications shall govern in the event of conflict between this list and the specifications. The following notes apply to the submittals if indicated in the submittal schedule below.

1. The submittal shall be submitted, for information only, 10 calendar days after award and before the items are incorporated into the work.
2. The submittal shall be submitted, for approval, 10 calendar days after award and before the items are incorporated into the work.

SUBMITTAL SCHEDULE

<u>TP Sect/ Para. No.</u>	<u>Description of Data to be Submitted</u>	<u>Item(s) for which the Data is Required</u>	<u>Note</u>
.....			
08200[sic]/1.3	Certificate	Door	2
.....			

(R4, tab 1)

6. Incorporated into the contract by reference was the MATERIAL AND WORKMANSHIP (APR 1984) clause at FAR 52.236-5, which states in relevant part:

When required by this contract or by the Contracting Officer, the Contractor shall also obtain the Contracting Officer's approval of the material or articles which the Contractor contemplates incorporating into the work. When requesting approval, the Contractor shall provide full information concerning the material or articles. When directed to do so,

the Contractor shall submit samples for approval at the Contractor's expense, with all shipping charges prepaid. Machinery, equipment, material, and articles that do not have the required approval shall be installed or used at the risk of subsequent rejection.

....

(R4, tab 1)

7. The specification at Section 08201, WOOD DOORS, stated at paragraph 1.3, SUBMITTALS:

The contractor shall submit, *for information only*, a certificate from the door manufacture [sic] that the doors supplied meets [sic] the requirements of the contract. (Emphasis added.)

The HARDWARE and PAINTING sections of the specification varied in their certification requirements. Section 08700, HARDWARE required, for *approval*, a certificate signed by an authorized official stating that the items meet specified requirements. Section 09900, PAINTING required, for *information*, a manufacturer's certification that Federal specifications are met, but the certification was "proof of compliance until . . . tests are conducted[.]" (R4, tab 1)

8. Davis submitted a MATERIAL APPROVAL SUBMITTAL form on 24 June 1997 (submittal 2) which referenced section 08200 [sic], paragraph 1.3 of the specification. Submittal 2 listed "Door Certificate" under "Description of Material." Included with submittal 2 were materials describing doors made by C & S Corporation and an unsigned limited warranty. The submittal, which did not include the manufacturer's certificate required by paragraph 1.3 of section 08201, was disapproved with the following remark:

Paragraph 1.3 of Section 8201 requires a certification from the manufacture [sic]. Certificates must be submitted in accordance with paragraph H-8 (MATERIAL APPROVAL SUBMITTALS). Certificates must be executed by an officer of the company and notarized. Certificate shall be submitted for information only.

(R4, tab 5) The cost of the doors in submittal 2 was \$89,680 (complaint exhibit 1).

9. We are unable to discern, by comparing it to the specifications, whether submittal 2 met contract requirements. For example, we find no mention of preservative

treatment, which is required to be “in accordance with [National Wood Window and Door Association] NWWDA I.S.4” by paragraph 2.1.2 of section 08201. While a typed cover sheet states “Doors manufactured to NWWDA ISA standards,” it does not provide information as to which NWWDA standards are met. Section 08201 requires compliance with specific NWWDA standards - NWWDA I.S. 1-A and NWWDA I.S. 4. (R4, tab 1) There is no other evidence on whether submittal 2 was in compliance with the contract requirements.

10. On 21 July 1997 Davis sent submittal 2A to the contracting officer. It referenced specification section 08200 (sic), paragraph 1.3. Under Description of Materials, “DOOR CERTIFICATE” was typed, followed by the handwritten initials “FIO” in parentheses. Submittal 2A included a notarized certification from the president of Florida Made Door Co. that the doors made by his company met the specifications listed in the certification letter. Submittal 2A was approved on 24 July 1997. (Complaint exhibit 4) The cost of the doors in submittal 2A was \$103,824.06 (R4, tab 5).

11. By letter of 14 January 1998 appellant submitted a claim in the amount of \$14,144, representing the difference between the cost of the doors in submittal 2 and submittal 2A, and a 30 day extension. According to the claim letter, this was necessitated by the refusal of the submittal 2 supplier, C & S, to provide a certification. (R4, tab 5) Other than the claim letter, there is no evidence as to why appellant switched suppliers.

12. The claim was denied in a contracting officer’s decision dated 27 July 1998 (R4, tab 11). Appellant thereafter filed a timely appeal.

DECISION

Davis argues that submittal 2 met all requirements of the contract, which it asserts as “solid core doors constructed in accordance with standards published by the National Wood Window and Door Association (NWWDA)” (app. br. at 5). Davis also contends that, because of variances in the certification requirements found in the specifications, H.8 is applicable only if there is no specific requirement in the specifications. Finally, it argues that the warranty in submittal 2 constitutes a certification meeting contract requirements. Respondent argues that appellant did not comply with contract requirements for certification and the disapproval of submittal 2 was, therefore, proper. Appellant, as the proponent of the claim, bears the burden of proof. *Teledyne McCormick-Selph v. United States*, 588 F.2d 808 (Ct. Cl. 1978).

We conclude the order of precedence provision in TE 1 (finding 5) gives primacy to the specifications, with the result that the door certificate was for information only, not for approval. However, we do not conclude the H.8 requirement for a notarized statement from a company officer, which unquestionably was not submitted (finding 8), was

somehow vitiated by the specifications. We find no conflict between H.8 and section 08201. H.8 merely provides the specific requirements for the certificate mandated by section 08201. Further, we hold that appellant's argument that the limited warranty in submittal 2 met the certification requirement is without merit. The warranty was unsigned and H.8 requires a signed, notarized certificate (findings 4, 8).

Even assuming, *arguendo*, that submittal 2 should not have been rejected for the failure to provide a certificate, appellant has not established that the C & S doors in submittal 2 met contract specifications (finding 9) or why it changed suppliers (finding 10). The only explanation for changing suppliers is that C & S refused to execute a certificate.* That explanation is found in the claim letter, and we have previously rejected claim letters as proof of disputed facts. *Technocratia*, ASBCA Nos. 46567 *et al.*, 99-2 BCA ¶ 30,391 at 150,228. The appeal is denied.

Dated: 21 June 2000

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

(Signatures continued)

* If, as alleged, Davis switched suppliers because C & S refused to certify, this would give rise to the reasonable inference that C & S could not meet the specifications.

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. 51832, Appeal of The Davis Group, rendered in conformance with the Board's Charter.

Dated:

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