

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
H. Bendzulla Contracting ) ASBCA No. 51869  
 )  
Under Contract No. F02601-96-DC005 )

APPEARANCE FOR THE APPELLANT: Gerald J. Brentnall, Jr., Esq.  
Loomis, CA

APPEARANCES FOR THE GOVERNMENT: COL John M. Abbott, USAF  
Chief Trial Attorney  
CAPT Christopher J. Aluotto, USAF  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE YOUNGER  
ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Both parties have moved for summary judgment in this appeal regarding a contract to repair family housing units. Respondent contends that the contract unambiguously required appellant to install cable television and telephone outlets in the units. Appellant has cross moved, arguing that respondent constructively changed the contract. Appellant contends that comparable provisions in a previous contract were construed not to require such outlets, that the drawings and specifications were ambiguous, and that it relied on its interpretation in bidding. We deny both motions.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

1. By date of 26 August 1996, respondent issued solicitation no. F02601-96-B0049 for the repair of an estimated quantity of 72 Wherry family housing units, Phase V, at Davis-Monthan Air Force Base, Arizona. The 72 houses fell into nine different types. (R4, tab 1 at 1, 3)
2. Appellant had been part of a joint venture that performed the previous contract, referred to as the Phase IV contract, for the repair of other Wherry family housing units at the Base. (Affidavit of Horst Bendzulla (Bendzulla affidavit), ¶ 2)
3. Respondent sent a copy of the solicitation to prospective bidders, including appellant. (Affidavit of Judy C. Wadley (Wadley affidavit) at 3) Before bidding, appellant did not attend the site visit or request clarification of the solicitation. (*Id.*)

Appellant was the apparent low bidder, and the contracting officer requested appellant to verify its bid. Appellant thereafter did so. (*Id.*)

4. By date of 30 September 1996, respondent awarded contract no. F02601-96-DC005 to appellant. (R4, tab 1 at 2) It is undisputed that this contract, referred to as the Phase V contract, was nearly identical to the Phase IV contract. (Respondent's Motion for Summary Judgment (Motion), ¶ 3; Appellant's Response to Respondent's Motion for Summary Judgment and Appellant's Cross-Motion for Summary Judgment (Cross Motion), ¶ 3) During performance of the Phase IV contract, the parties concluded that the contractor was not required to install cable television and telephone service to each housing unit. Accordingly, effective 21 December 1994, they entered into bilateral modification 01 to the Phase IV contract to provide that "CONTRACTOR SHALL INSTALL TELEPHONE AND TV CABLE LINES TO EACH BEDROOM, LIVING ROOM AND KITCHEN AND PLACE CANS PER DRAWING TO EXTERIOR OF BUILDING FOR TELEPHONE AND CABLE ATTACHMENT. . . ." The motion papers include an affidavit from the contracting officer who signed modification 01 stating that she "did not thoroughly review the contract specifications" when she signed it. (Wadley affidavit at 2) In addition, effective 10 September 1996, the parties entered into bilateral Modification No. P00003 to the Phase IV contract, requiring the contractor to "[i]ninstall telephone and cable television outlets to each bedroom, living room and kitchen" and to "[i]ninstall telephone and cable weatherproof boxes per attached detail." (Cross Motion, attachments 6 at 3, 7 at 2) The motion papers include an affidavit from the contracting officer who signed modification P00003 stating that he "was very busy" and "should have caught the mistake" when he signed it. (Grimes affidavit at 3)

5. The Phase V contract contained various standard clauses, including FAR 52.236-21, Specifications and Drawings for Construction (APR 1984), and DFARS 252.236-7001, Contract Drawings, Maps, and Specifications (DEC 1991). (*Id.* at 19, 22)

6. The Phase V contract also contained specifications, and it is undisputed that they contain no express reference to the installation of cable television or telephone lines or outlets.

7. The Phase V contract also contained drawings. Sheet 2 of 17 of drawing no. 500-120, FBNV 950014, Site Plan - Repair Exterior Wherry Housing - Phase 5, included General Note 5, which provided:

GENERAL CONTRACTOR SHALL COORDINATE  
BETWEEN CABLE T.V. AND TELEPHONE COMPANY  
FOR DISATTACHMENT AND REATTACHMENT OF  
THEIR RESPECTIVE CABLES FROM SIDES OF  
HOUSING UNITS. . . .

(R4, tab 5 at 1) On the same sheet, General Note 14 provided:

INSTALL ADDITIONAL CABLE TV AND TELEPHONE  
OUTLETS AS SHOWN ON THE FLOOR PLAN. DO NOT  
USE CABLE TELEVISION SPLITTER. PROVIDE  
SINGLE WIRE TO EACH CABLE OUTLET.

(*Id.*) The same sheet also contained a legend with three different symbols used in the ensuing sheets to indicate where the contractor was to “INSTALL CABLE TV OUTLET 18” A.F.F. [above finished floor],” to “INSTALL TELEPHONE WALL OUTLET 18” A.F.F.” and to “INSTALL TELEPHONE WALL OUTLET 54” A.F.F.” (*Id.*) We find that such symbols were employed on the floor plans appearing in certain of the following sheets.

8. Sheet 15 of 17 of contract drawing 500-120, 3ARU Floor Plan and Elevations (Hip Roof) Repair/Exterior Wherry Housing - Phase 5, included detail 2, which provided, with respect to one house type,: “ELEVATION OF CABLE TV AND TELEPHONE SERVICE. NOTE: TWO CONNECTIONS REQUIRED ONE FOR CABLE TV AND ONE FOR TELEPHONE. NOTE: SEE GENERAL NOTE 14 [finding 7] FOR ADDITIONAL INFORMATION.” (Attachment 2 to Motion at 15)

9. Sheet 17 of 17 of contract drawing 500-120, Details Repair/Exterior Wherry Housing - Phase 5,” contains exterior details for two of the house types with the notation “1” x 1” CHASE FOR CABLE AND TV WIRING. VERIFY LOCATION.” (*Id.* at 17)

10. On 7 November 1996, the parties held a pre-performance meeting to discuss various contract requirements. (R4, tab 7) Appellant’s owner inquired whether respondent intended to modify the specifications to include cable television and telephone outlets, asserting that he did not include the installation of such items in his bid because there was no reference to them in the specifications. (R4, tab 7 at 6; Wadley affidavit at 4)

11. After determining that the contract required installation of cable television and telephone outlets, the contracting officer advised appellant by letter dated 8 November 1996 that the drawings required the installation of such items. (R4, tab 8) Appellant thereafter installed cable television and telephone capacity in the units.

12. By letter to the contracting officer dated 13 July 1998, appellant submitted a claim for \$96,182.37 as the additional costs of complying with the contracting officer’s directive and removing existing cable television and telephone boxes, installing new boxes and reconnecting service. (R4, tab 10 at 1) Thereafter, by decision dated

26 August 1998, the contracting officer denied the claim (R4, tab 11) and this appeal followed.

13. The motion papers include the affidavit of Horst Bendzulla, appellant's owner. With respect to a pre-bid request for clarification, Mr. Bendzulla stated that, during performance of the Phase IV contract, he advised the contracting officer that requirements under that contract to install the outlets and coordinate the work of the telephone and cable television companies did not describe "the details of the work the government wanted done" and he proposed changes. Thereafter,

[w]hen I received the solicitation package for [the subject contract] the plans and specifications had NOT been changed as I had suggested. Because I had advised the government of their action on numerous occasions I could only assume that the failure to make the change was intentional. In reliance on the plans and specifications as written, I bid the Phase V solicitation in the same manner as I had bid the Phase IV solicitation. The prices were reduced just slightly so that I could remain competitive now that all the other bidders knew my previous contract price. I assumed that the government intended to modify the contract after award, as they had done on the Phase IV contract, to correct their oversight. Had the government notified the bidders of their current assertion, that the contract includes the television and cable tv system, then I would have bid substantially higher than my Phase IV price.

(Bendzulla affidavit, ¶¶ 2 a-c, 4) (emphasis in original) It is undisputed that appellant is unable to produce its bidding documents. (Motion, ¶¶ 19-20; Cross Motion, ¶¶ 19-20)

14. With respect to the adequacy of the plans and specifications, Mr. Bendzulla also stated that, while the drawings refer to "outlets," those are simply "the plates that go on the wall for tv and telephone," but they constituted only a portion of what respondent wanted installed. He further asserted that "[t]he claim refers to the telephone and cable tv systems. The government actually wanted a complete cable tv system put in the house to include all wiring, boxes, conduit, weatherproof conduit, main runs and associated equipment. It is much more than just 'outlets.'" Mr. Bendzulla also attested that the specifications omitted critical details regarding what respondent desired, such as the type of outlets and wire to be installed, how the system was to be installed, and the electrical or cable requirements. (Bendzulla affidavit, ¶¶ 5, 6)

#### DECISION

In its motion, respondent contends that summary judgment is warranted in its favor for two reasons. First, the contract unambiguously required appellant to install cable and telephone outlets and, even if it is regarded as ambiguous, appellant failed to seek pre-bid clarification. Second, respondent insists that appellant's inability to establish pre-bid reliance precludes recovery on a constructive change theory. (Motion at 11-12) For its part, appellant opposes respondent's motion and cross moves for summary judgment, arguing principally that the undisputed facts establish the drawings and specifications were incomplete and ambiguous, and that it relied upon its present interpretation in submitting its bid.

The applicable procedural standards are well-settled. "The fact that both parties have moved for summary judgment does not mean that the [Board] must grant judgment as a matter of law for one side or the other; summary judgment in favor of either party is not proper if disputes remain as to material facts." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). A material fact is one that will affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The applicable substantive standards are also well-settled. A contract provision that is "reasonably susceptible of more than one interpretation" is ambiguous. *Edward. R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986). If the ambiguity is "obvious, gross [or] glaring," then it is patent, *H & M Moving, Inc. v. United States*, 499 F.2d 660, 671 (Ct. Cl. 1974), and the contractor must "inquire of the contracting officer as to the true meaning of the contract before submitting a bid." *Triax Pacific, Inc. v. West*, 130 F.3d 1469, 1475 (Fed. Cir. 1997). By contrast, if the ambiguity is not glaring, substantial or patently obvious, then it is latent, *Grumman Data Systems Corp. v. Dalton*, 88 F.3d 990, 997 (Fed. Cir. 1996), and the contractor must establish reliance on its current interpretation in bidding. *E.g., Fruin-Colnon Corp. v. United States*, 912 F.2d 1426, 1429 (Fed. Cir. 1990).

We conclude that neither party is entitled to summary judgment. With respect to respondent's motion, we reject the argument that the contract is unambiguous. Regardless of the conclusion that we might reach on a fuller record, we are unable to say on the present record that the recurring requirement to install "outlets" (*see* finding 7) is the equivalent of installing cable television and telephone capacity in each unit. While respondent stresses the requirement in General Note 14 to "PROVIDE SINGLE WIRE TO EACH CABLE OUTLET" (*id*), that requirement pertains only to cable television capacity and not to telephone capacity. In any event, the present record also contains an affidavit from appellant's president that the claim covers the "complete cable tv system . . . in the house to include all wiring, boxes, conduit, weatherproof conduit, main runs and associated equipment," (finding 14; *see also* finding 12), not outlets and wiring for the cable television alone.

We also reject respondent's argument that, if the contract is ambiguous, it contains a patent ambiguity. The premise of the argument is that because the installation of cable and telephone outlets was an issue under the Phase IV contract (*see* finding 4), appellant had a duty to seek pre-bid clarification on this contract. (Motion at 16) The affidavit from appellant's owner, however, states that he assumed that respondent intentionally decided not to seek a cable television and telephone capacity under this contract (finding 13). The affidavit establishes the existence of a material issue as to whether the ambiguity is patent or latent. For purposes of the motion, we treat the ambiguity as latent and reject respondent's contention that testimony alone is insufficient to prove the requisite reliance. *Malloy Construction Company*, ASBCA No. 25055, 82-2 BCA ¶ 16,104 at 79,953, did not establish such a *per se* rule. *Malloy* held that the testimonial reliance evidence was not credible on that record, but that is a determination that we cannot make on summary judgment here.

With respect to appellant's cross motion for summary judgment, we conclude that the present record does not establish that there are no triable issues regarding the completeness of the drawings and specifications, or that appellant relied upon its present interpretation before bidding.

#### CONCLUSION

Respondent's motion for summary judgment and appellant's cross motion for summary judgment are each denied.

Dated: 29 February 2000

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ALEXANDER YOUNGER  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

I concur

I concur

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

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CARROLL C. DICUS, JR.  
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. 51869, Appeal of H. Bendzulla Contracting, rendered in conformance with the Board's Charter.

Dated:

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