

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Ortech, Inc.) ASBCA No. 52228
)
Under Contract No. N62472-96-M-3239)

APPEARANCE FOR THE APPELLANT: Mr. Dogan Uyger
Vice President

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.
Navy Chief Trial Attorney
Ellen M. Evans, Esq.
Trial Attorney
Engineering Field Activity
Chesapeake
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE DICUS

This appeal is taken from a contracting officer's decision denying the claim of appellant Ortech, Inc. (Ortech) for an equitable adjustment of \$54,300.36. The underlying contract is for the upgrading of a neutralization basin at the Naval Air Station, Lakehurst, New Jersey. We deny the appeal.

FINDINGS OF FACT

1. Contract No. N62472-96-M-3239 was awarded to Ortech on 27 September 1996 for the fixed-price of \$84,480. The contract incorporated the Disputes (OCT 1995) (Alternate I) (DEC 1991) clause at FAR 52.233-1, and the Changes and Changed Conditions (APR 1984) clause at FAR 52.243-5, which requires the contractor to submit any proposals for adjustment to the price or performance period prior to final payment. Other clauses included the Inspection of Construction (JUL 1986) clause at FAR 52.246-12 and the Warranty of Construction (MAR 1994) clause at FAR 52.246-21, under which the contractor warrants the work for one year after final inspection. The original completion date for the contract was 10 February 1997. (R4, tab 1)

2. The contract price was increased to \$101,265 and the completion date was extended to 20 June 1997 by Modification Nos. P00001-P00003, all of which were bilateral (R4, tab 2).

3. An underground leak was detected during construction. Upon investigation it was determined the leak was caused by Ortech connecting a water line into the pipe leading to the neutralization building without capping the pipe. In a 15 May 1997 letter, Ortech was required to, and did, return and cap the pipe. (Tr. 26-28, 101-04; R4, tabs 68, 122) Ortech's 27 May 1998 claim letter lists this as the basis for item No. 1 (R4, tab 122).

4. Ortech installed 2 new solenoid valves upstream of an existing backflow preventer valve. The system did not work and Ortech was ordered to remove the existing valve at no cost to respondent in a 22 May 1997 letter. (R4, tab 72; tr. 31-32, 96, 104-05) Ortech's 27 May 1998 claim letter lists this as the basis for claim item No. 2 (R4, tab 122).

5. The contract required a strip chart recorder to permanently record pH readings (tr. 36-37). Ortech could not find an American-made recorder and informed respondent on 18 February 1997 (R4, tab 51). A recorder was approved on 3 April 1997 which may not have been American-made (R4, tab 60; tr. 105-06). According to Ortech's vice president, Dogan Uyger, this delayed Ortech's performance of the contract. Ortech sought a 90 day extension by letter of 16 May 1997 (R4, tab 70; tr. 105-07) Ortech's 27 May 1998 claim letter lists this as the basis for claim item No. 3 (R4, tab 122).

6. On 30 June 1997 Ortech sent a FAX to respondent seeking a response to appellant's request for information regarding possible modification of the sequence control panel. Dogan Uyger of Ortech informed respondent of his plans for a vacation commencing 10 July 1997 and stated he would like the proposed change to be completed by that time (R4, tab 80). On 2 July 1997 Mr. Uyger sent another FAX with a circuit design for the changes to the sequence control panel (R4, tab 81). Ortech submitted a proposal in the amount of \$2,896.36 for the proposed change on 8 July 1997 (R4, tab 82). On 9 July 1997 Mr. Uyger sent another FAX to respondent requesting an answer on its proposal as soon as possible (R4, tab 83). Later the same day Mr. Uyger sent yet another FAX to respondent stating he was leaving for vacation at noon on 10 July 1997 and needed to know no later than 10:00 a.m. on 10 July 1997 whether respondent wanted Ortech to do the work. By return FAX respondent informed Ortech that it would "accomplish the proposed work by other means." (R4, tab 84) The work was subsequently performed by Ortech's electrical subcontractor under another contract at a price lower than proposed by Ortech (tr. 107-09). Ortech's 27 May 1998 claim letter lists this as the basis for claim item No. 4 (R4, tab 122).

7. Ortech made various requests for final inspection starting in June 1997 (tr. 111). Final inspection was held 9 October 1997 (R4, tab 99). A punch list containing 7 items was issued on 9 October 1997 (R4, tab 100). Ortech's 27 May 1998 claim letter

lists refusal to schedule final inspection until 9 October 1997 as claim item No. 6¹ (R4, tab 122).

8. Ortech's subcontractor installed an air solenoid valve that malfunctioned, which was identified on the punch list. Ortech's subcontractor returned and cleaned out the line to which the valve had been installed on 14 November 1997 and the system worked thereafter (R4, tab 100; tr. 111-12). Ortech's 27 May 1998 claim letter lists this as the basis for claim item No. 7 (R4, tab 122).

9. Ortech installed stainless steel piping and an acid flow meter. Sometime prior to 9 July 1997 the acid became cloudy and, after several attempts at repair, it was discovered that the connection to the acid line was incorrect. Ortech's subcontractor connected the line properly in March 1998. (R4, tabs 85, 114, 122; tr. 113-15) Mr. Uygur believes respondent should have discovered the cause of the problem at the outset (tr. 15). There is no evidence that the defect was discoverable from a reasonable inspection, and the failure of appellant or its subcontractor to find the problem after several attempts at repair is evidence to the contrary. Ortech's 27 May 1998 claim letter lists this as the basis for claim item No. 8 (R4, tab 12).

10. On 26 September 1997 Ortech submitted a full release acknowledging payment of \$91,058 and a balance remaining of \$10,207 (R4, tab 124). By letter of 15 January 1998 the contract work was accepted with an effective date of 20 June 1997 (R4, tab 116). On 3 February 1998 the contracting officer authorized final payment of \$10,207 to Ortech, which Ortech accepted (R4, tab 123; complaint). It is not disputed that Ortech received final payment, which it used to pay its subcontractors (tr. 10-12, 15-16).

11. On 27 May 1998 appellant submitted a claim in the total amount of \$54,300.36. The claim, which did not seek a time extension, was comprised of the following items:

1. Underground water leak	\$ 5,895.00
2. Solenoid valve	1,898.00
3. Strip chart recorder	3,000.00
4. Sequence control panel	2,896.36
6. Refusal of final inspection	19,000.00
7. Solenoid valve malfunction	2,756.00
8. Leak in stainless steel piping and flowmeter coloring	<u>18,855.00</u>
Total	\$54,300.36

¹ There is no claim item No. 5.

(R4, tab 122) There is no evidence the claim items were brought to respondent's attention prior to submission of the claim. There is no evidence the contracting officer knew of or is chargeable with knowledge of any claim items prior to the claim. Moreover, the contracting officer testified, and we find, that exception of claim items in the release would not have affected final payment (tr. 145-46).

12. The claim was denied in a final decision dated 9 April 1999 (R4, tab 121). An appeal was filed on 11 June 1999.

DECISION

Ortech contends, in effect, that the contract was constructively changed and that it should be compensated. Respondent, in its answer, states that the claim is barred by acceptance of final payment without reservation of any claims in the release executed in conjunction therewith. We agree with respondent.

Ortech has acknowledged receipt of final payment prior to submission of its claim. There is no evidence that Ortech reserved any of the items in the claim now before us and no evidence that the contracting officer was aware of or is properly chargeable with knowledge that Ortech was asserting a right to additional compensation at the time of final payment. Indeed, Ortech seems to argue that it had no choice but to submit its release and invoice for final payment without assertion of any right to additional compensation because it feared that assertion of a perceived right to additional compensation would delay final payment (finding 11). However, we have found that final payment would not have been affected by Ortech's reservation of the claims in the release (*id.*). The burden is on the contractor to identify and specify exceptions to the release prior to final payment, and the failure to do so bars recovery. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387 (Fed. Cir. 1987).

The only portion of the claim for which an identifiable proposal seeking a price increase was submitted is item 4, the sequence control panel (findings 6, 10). In that instance, Ortech sought a definite response within 2 days of respondent's receipt of the proposal. Respondent answered in the negative and Ortech gave no hint that it intended to file a claim based on this incident prior to final payment. We cannot find on this record that Ortech reserved a claim for work done on the sequence control panel.²

² Moreover, the record establishes, and Ortech concedes, that its electrical subcontractor did the work at issue on the sequence control panel under a separate contract (tr. 108-09). Thus, even if Ortech had reserved the claim it has failed to prove that it did work not required by the contract with respect to the sequence control panel.

Moreover, although Ortech sought a time extension with respect to the strip chart recorder (item 3), the claim does not seek a time extension. Accordingly, we hold that Ortech's claim is barred by acceptance of final payment without reserving any part of the claim at issue. *Mingus, supra.*

Claim item No. 8 was not finally repaired until March 1998, after final payment. Ortech's position seems to be that respondent should have identified the mistake made by Ortech's subcontractor at the outset of the problem. We interpret this as an argument that respondent performed an improper inspection. However, there is no evidence the defect was discoverable from a reasonable inspection and the repair was effected well within the one year period from the 20 June 1997 acceptance date prescribed by the Warranty of Construction clause (findings 2, 9). The appeal is denied.

Dated: 27 January 2000

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

(Signatures continued)

I concur

I concur

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

PETER D. TING
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. 52228, Appeal of Ortech, Inc., rendered in conformance with the Board's Charter.

Dated:

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