

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Bean Stuyvesant, LLC) ASBCA No. 52889
)
Under Contract No. DACW64-99-C-0017)

APPEARANCE FOR THE APPELLANT: Peter M. Kilcullen, Esq.
Bell, Boyd & Lloyd PLLC
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.
Engineer Chief Trial Attorney
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Engineer Trial Attorney
U.S. Army Engineer District,
Galveston

OPINION BY ADMINISTRATIVE JUDGE PAGE
UNDER BOARD RULE 11

Bean Stuyvesant, LLC (Bean Stuyvesant, appellant or contractor) timely appealed the decision of the contracting officer refusing to pay the full amount the contractor bid as bond costs in this fixed-price construction contract. The Government asserts appellant is entitled only to reimbursement for the cost of premiums for the required bid, performance, and payment bonds. It relies upon a provision in the instructions to bidders concerning the amount to be entered as bond costs, and alleges subparagraph (g) of the PAYMENTS clause, FAR 52.232-5 (MAY 1997), restricts recovery of bond costs to reimbursement of premiums paid. The parties elected to pursue the matter under Board Rule 11 “Submission Without a Hearing.” Both entitlement and quantum are before the Board for decision. We sustain the appeal.

FINDINGS OF FACT

1. Following receipt of sealed bids, the Galveston District of the U.S. Army Corps of Engineers awarded Contract No. DACW64-99-C-0017, Houston-Galveston Navigation Channels, TX, Dredging Jetty and Entrance Channels in Galveston County, to Bean Stuyvesant on 19 March 1999. The contract, in the estimated amount of \$28,670,334, required Bean Stuyvesant to perform new work dredging to depths of -47 and -49 feet in the Jetty and Entrance Channels in Galveston County, TX. (R4, tab 7; Stipulations of Fact (hereinafter Joint Stipulations) ¶ 1)

2. The contract contained the following Bidding Schedule as filled in by Bean Stuyvesant:

BIDDING SCHEDULE

Item No.	Description	Estimated Quantity	Unit	Unit Price	Estimated Amount
000 1	Mobilization and Demobilization, Sections 1 thru 6	1	Job	Sum	\$2,700,000.00
000 2	Mobilization and Demobilization, Sections 7 thru 10	1	Job	Sum	\$700,000.00
000 3	Dredging, Sections 1 thru 6	3,885,200	C.Y.	\$4.02	\$15,618,504.00
000 4	Dredging, Sections 7 thru 10	3,422,900	C.Y.	\$2.70	\$9,241,830.00
000 5	Sea Turtle Protection, Sections 1 thru 6	1	Job	Sum	\$65,000.00
000 6	Sea Turtle Protection, Sections 7 thru 10	1	Job	Sum	\$70,000.00
000 7	Bond Costs (Price to Include Cost of Bid Bond, Performance and Payment Bonds)	1	Job	Sum	\$275,000.00
TOTAL SCHEDULE NO. 1					\$28,670,334.00

(R4, tab 7)

3. The contract contained standard clauses derived from the Federal Acquisition Regulation (FAR) and Defense FAR Supplement (DFARS). In relevant part these include:

54 [FAR] 52.232-5 PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (MAY 1997) [PAYMENTS clause]

(a) Payment of price. The Government shall pay the Contractor the contract price as provided in this contract.

....

(g) Reimbursement for bond premiums. In making these progress payments, the Government shall, upon request, reimburse the Contractor for the amount of premiums paid for

performance and payment bonds (including coinsurance and reinsurance agreements, when applicable) after the Contractor has furnished evidence of full payment of surety. The retainage provisions in paragraph (e) of this clause shall not apply to that portion of progress payments attributable to bond premiums.

(h) Final payment. The Government shall pay the amount due the Contractor under this contract after—

(1) Completion and acceptance of all work;

....

90 [DFARS] 252.236-7008 CONTRACT PRICES--BIDDING SCHEDULES (DEC 1991)

(a) The Government's payment for the items listed in the Bidding Schedule shall constitute full compensation to the Contractor for—

(1) Furnishing all plant, labor, equipment, appliances, and materials; and

(2) Performing all operations required to complete the work in conformity with the drawings and specifications.

(b) The Contractor shall include in the prices for the items listed in the Bidding Schedule all costs for work in the specifications, whether or not specifically listed in the Bidding Schedule.

(R4, tabs 4, 5)

4. In addition to standard contract clauses from the FAR and DFARS, the Government included provisions developed locally. Relevant to this appeal are:

15. BIDDING REQUIREMENTS (CESWG). The work shall be performed for the amounts shown on the Bidding Schedule. (See CONTRACT PROVISION DFARS 252.236-7008).

....

17. BOND COST (CESWG). Payment for Bond Cost will be made pursuant to contract lump sum price as stated in the Bidding Schedule.

(R4, tab 6, Section 00820, Specific Project Requirements at 00820-6)

5. The solicitation advised that the Government contemplated award of a fixed-price contract (R4, tab 12, section 00100, Instructions, Conditions, and Notices to Bidders, ¶ 14 at 00100-6). The instructions provided information regarding bond costs:

29 52.1972-4002 BOND COST (EFARS JAN 1997) 19.7202

“In accordance with FAR clause 52.232-5(g), the Government will reimburse the contractor only for the amount of premium paid to the surety for performance and payment bonds. This is the amount to be entered as the Bond Costs on the Bidding Schedule.”

(R4, tab 3)

6. This instruction to bidders was derived from Part 19 of the EFARS, the Corps of Engineers’ supplement to the FAR and DFARS, which dealt with Small Business and Disadvantaged Business Concerns. Paragraph 19.7202(c)(S-100), under the title APPLICABILITY, provided:

Include the following language in the instructions to bidders in all solicitations that include DFARS clause 252.219-7008.

“In accordance with FAR clause 52.232-5(g), the Government will reimburse the contractor only for the amount of premium paid to the surety for performance and payment bonds. This is the amount to be entered as the bond cost on line ___ of the bid schedule.”

(Bd. corresp. file, app. letter of 7 September 2000, attach.)

7. The solicitation did not contain DFARS 252.219-7008, cited in EFARS 19.7202. The DFARS clause had been enacted on 29 April 1996 as part of a Department of Defense test program giving evaluation preferences to small disadvantaged business concerns. 61 Fed. Reg. 18688 (1996). However, the provision was repealed effective 1 October 1998, in connection with regulatory revisions relating to the Supreme Court decision in *Adarand*

Constructors, Inc. v. Pena, 515 U.S. 200 (1995). 63 Fed. Reg. 41974-75 (1998). The instant solicitation was issued 25 January 1999 (R4, tab 7).

8. Bean Stuyvesant bid a fixed lump sum price of \$275,000 for contract line Item No. 0007 BOND COSTS (CLIN 0007). This lump sum price included the out-of-pocket premium costs for the bid bond, and performance and payment bonds. Bean Stuyvesant also included an estimated amount for what it termed indirect costs associated with creating and maintaining a bonding capacity, and for a surcharge imposed by the bonding company. (Affidavit of Ancil S. Taylor, Vice President/General Manager of Bean Stuyvesant, ¶¶ 4-7; Joint Stipulations ¶ 10)

9. On 13 September 1999, the Government received Bean Stuyvesant's first invoice which sought \$275,000 for CLIN 0007 BOND COSTS. Bean Stuyvesant provided documentation for payment of \$124,406.00 to National Union Fire Insurance Co. for performance and payment bonds for the project. (R4, tab 9 at 10, 13-14)

10. In a telephone conversation on 14 September 1999 between Bean Stuyvesant's vice president and the Government's contracting officer (CO), the CO advised that the Government would pay only the cost of the bond premiums paid to the surety and that no further payments would be made for the item. Bean Stuyvesant disputed the CO's position by letter dated 16 September 1999. (R4, tab 10; Joint Stipulations ¶¶ 11, 12) The Government affirmed its position in a letter 22 September 1999, stating that the balance for CLIN 0007 as invoiced by the contractor would not be paid (R4, tab 11; Joint Stipulations ¶ 14).

11. Bean Stuyvesant continued to bill the Government for the full amount bid for bond costs, specifically the amount in excess of reimbursement for bond premiums. The difference between CLIN 0007 for bond costs and the amount the contractor paid for bond premiums was \$150,594.00. (R4, tab 9 at 24, 28; Joint Stipulations ¶ 13)

12. Bean Stuyvesant's certified claim for \$150,594 was received on 19 October 1999 (R4, tabs 2, 13). The CO, on 22 November 1999, denied the claim in its entirety, stating that the contractor was entitled only to be reimbursed for the cost of bond premiums after evidence had been furnished of payment made. The CO primarily relied upon paragraph 29 BOND COST of the instructions to bidders, and FAR clause 52.232-5(g). The CO dismissed the contractor's assertion of contract § 00820, Specific Project Requirements ¶ 17 BOND COST (CESWG) which provided for payment for bond cost in accordance with the contract lump sum price. The CO reasoned that this locally-developed clause could not take precedence over either the FAR or EFARS. (R4, tab 2) Bean Stuyvesant filed a timely notice of appeal (R4, tab 1).

DECISION

Only Bean Stuyvesant's interpretation of the contract that the contractor is entitled to recover the entire lump sum amount bid and accepted for CLIN 0007 BOND COSTS is reasonable. This was a firm, fixed-price contract awarded in accordance with FAR 36.207 PRICING FIXED-PRICE CONSTRUCTION CONTRACTS, which provides that generally this type of contract "shall be used to acquire construction." A firm-fixed-price contract is described by FAR 16.202-1 as providing for a price that is not subject to any adjustment on the basis of the contractor's cost experience. This contract type places maximum risk upon the contractor and full responsibility for all costs and resulting profit or loss, while imposing a minimum administrative burden upon the contracting parties.

Subparagraph (a) of the PAYMENTS clause obligated the Government to pay the amount established in the contract as the fixed price, which was determined by the parties' mutual agreement to be the specific sums contained in Bean Stuyvesant's sealed bid. That bid was prepared in accordance with the contract's Bidding Schedule, which required CLIN 0007 BOND COSTS to be bid as a flat sum to "include the Cost of Bid Bond, Performance and Payment Bonds."¹ Specific project requirements paragraph 17 reinforced the nature of the Government's obligation by stating "[P]ayment for Bond Cost will be made pursuant to contract lump sum price as stated in the Bidding Schedule."

The Government's attempted reliance upon subparagraph (g) of the PAYMENTS clause to limit Bean Stuyvesant's recovery to reimbursement for bond premiums is misplaced. The language in subparagraph (g) has been interpreted repeatedly to be procedural in nature, giving the contractor the option of receiving reimbursements for performance and payment bond premiums as part of progress payments. That portion of the PAYMENTS clause only describes "methods and procedures by which [repayment of bond premiums] will be made and [has] no bearing on the contract price which is identified elsewhere in the contract." *Reese Industries*, ASBCA Nos. 25862 *et al.*, 83-1 BCA ¶ 16,245 at 80,744, discussing a predecessor version of FAR 52.232-5(g) and citing RESTATEMENT CONTRACTS § 230; *see also Spickard Enterprises, Inc.*, ENGBCA No. 4509, 81-1 BCA ¶ 14,878 and *Moulder Bros.*, ASBCA No. 31769, 86-3 BCA ¶ 19,297. Subparagraph (g) does not confer entitlement upon a contractor for the reimbursement of bond premiums, nor does it restrict the contractor's right to recover the lump sum bid as bond costs.

¹ This appeal is distinguished from two decisions relied upon by the Government. In both *D&J Construction, Inc.*, ENGBCA No. 5291, 88-2 BCA ¶ 20,678 and *The Lane Construction Corp.*, ENGBCA No. 5880, 93-1 BCA ¶ 25,448, the Government included language in the bidding schedule restricting bond costs to reimbursement for actual bond premiums paid. Such language was not used in the instant bidding schedule.

In addition to the PAYMENTS clause, the Government also argues it restricted the contractor's recovery of bond costs to reimbursement for premiums by including an excerpt from a Corps of Engineers' acquisition regulation, intended for use with a superseded DFARS clause, in paragraph 29 of the instructions to bidders. That instruction was not part of the contract, and cannot change the plain meaning of the bidding schedule, especially where all other contract terms support the contentions of Bean Stuyvesant.

Using standard procurement clauses from the FAR and DFARS, the Government established a fixed-price construction contract and agreed to pay the price provided in the contract. The contract price was based upon the Bidding Schedule, in which Bean Stuyvesant submitted \$275,000 as bond costs which it asserts included "indirect costs" associated with creating and maintaining its bonding capacity. Subsequent to award the Government attempted to reduce the agreed-upon sum for bonds to only the expenses of bond premiums. This would convert one element of the fixed-price construction contract into a cost-reimbursable item, which was inconsistent with the contract's terms. The Government is obligated under the contract to pay the full amount included as CLIN 0007 BOND COSTS. Although the Government argues that the amount is excessive and cannot be substantiated under even a broad reading of "all costs" as described in DFARS 252.236-7008, the Government's protestations come too late.

CONCLUSION

The appeal of Bean Stuyvesant is sustained. The contractor is entitled to recover \$150,594, the difference between the \$275,000 bid as bond costs and the \$124,406 previously paid by the Government as reimbursement of performance and payment bond premiums. Bean Stuyvesant is also entitled to interest on \$150,594 from 19 October 1999, the date the claim was received by the CO, until the amount found due is paid. 41 U.S.C. § 611.

Dated: 6 December 2000

REBA PAGE
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
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. 52889, Appeal of Bean Stuyvesant LLC, rendered in conformance with the Board's Charter.

Dated:

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