

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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A.R. Mack Construction Co., Inc.) ASBCA No. 50035
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Under Contract No. DACA51-93-C-0077)

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OPINION BY ADMINISTRATIVE JUDGE HARTMAN

Appellant seeks an equitable adjustment to its contract based on the Government's post-award letter stating the heat distribution system was to be buried "not less than five and a half feet below finished grade." According to appellant, it bid the contract based on installation of the system at a depth of approximately 5 feet, but to comply with the Government's letter was required to install the system below the storm sewer at depths as great as 13 to 14 feet.

The Government contends that appellant is barred from receiving an equitable adjustment because a lack of elevations for the heat distribution system on the contract drawings was a "patent ambiguity" and appellant did not inquire about the elevations prior to bidding. Additionally, the Government contends that appellant is barred from receiving an equitable adjustment based on failure to furnish "timely notice" it deemed system installation at a depth of "not less than five and half feet" to constitute a "change" to the parties' contract.

FINDINGS OF FACT

On 30 September 1993, the United States Army Corps of Engineers, New York District (Corps), awarded a contract, No. DACA51-93-C-0077, to appellant, A.R. Mack Construction Co., Inc. (Mack) in the sum of \$6,790,000 for the construction of a general purpose warehouse at Fort Drum in Watertown, New York. Standard clauses set forth in the contract included Federal Acquisition Regulation (FAR) 52.233-1 DISPUTES (DEC 1991) and 52.243-4 CHANGES (AUG 1987). (R4, tab D; stip. ¶ 1)

Among the items to be installed as part of the contract were water supply lines, a storm water drainage system, sanitary sewer pipe, and a high-temperature, hot-water (HTHW) heat distribution system. Contract specification section 02695 provided for installation of a “preapproved” HTHW heat distribution system consisting of insulated hot water supply and return pipes to be buried underground, together with fittings and appurtenances necessary for a complete and operable system, “in accordance with direction from the system supplier.” Paragraphs 1.3 and 1.7 of that contract specification section stated that the system supplier was to have a representative present at the job site during performance of specified work, such as initial backfill and taking of final elevation readings regarding the slope of the system, and that the supplier’s representative was to prepare daily reports when present at the job site stating “whether or not the condition and quality of the materials used and the installation of the [HTHW] system are in accordance with the drawings, specifications, and [HTHW system] Approved Brochure.” Paragraph 1.4 of that specification section provided:

b. Contract drawings. Contract drawings indicate general pipe route only. Contractor is responsible for submitting a detailed design layout prepared by the system supplier. Detailed design layout shall include design and location of expansion loops, Z-bends, and L-bends and shall also include system details required to show that the specified heat loss has not been exceeded and minimum insulation thickness has been met. . . .

Paragraph 3.1 of that specification section stated, in relevant part, that the “preapproved system shall be installed, inspected, and tested in accordance with the contract drawings and specifications, the system supplier’s Approved Brochure and any directions given by the system supplier’s representative.” Paragraph 3.4 of the specification section further stated: after performing initial backfilling, but before covering top of casing with backfill material, the “Contractor shall measure and record the elevation of the top of the casing in the trench”; the “measurement shall be checked against the contract drawings”; and the measurement shall “confirm that the conduit system has been installed to the elevations shown on the contract drawings.” (R4, tab D; stip. ¶ 1)

Contract drawing SU-5 (High Temperature Hot Water Details) set forth various details for the HTHW system specified by the Corps, but did not include any “inverts” or casing top “elevations.” While other drawings set forth such elevations for the storm sewer, none contained any elevations for the HTHW system. (R4, tab B; stip. ¶ 6; tr. 29, 32-37, 66, 100-01)

In bidding the contract, Mack relied on a bid by Armani Plumbing & Mechanical (Armani) to perform the interior plumbing, sprinkler system, heating, ventilation and air conditioning, sanitary sewer, storm sewer, domestic water and HTHW heat system work. After receipt of award of the contract, Mack entered into a subcontract with Armani for Armani to perform the work upon which it had submitted a bid to Mack. (Tr. 16-17, 45; stip. ¶ 3)

Armani planned and bid the job logically -- to install first the pipes buried deepest at five and a half to nine feet, *i.e.*, the storm sewer, then the sanitary water pipes above the storm sewer, and finally the HTHW lines above the other pipes (tr. 23-24, 29, 32-39, 42-45). As a result of its prior experience installing underground plumbing, particularly HTHW heat systems in the northern New York area, Armani knew the frost line was approximately four and a half to five feet below grade. Armani also knew that, because the HTHW system was a closed, integrated system containing two pipes surrounded by insulation inside of a larger pipe with the two internal pipes transporting water at high temperatures under pressure, there was little concern about freezing. Based upon this data and the fact that installation at a depth as shallow as three feet was within the HTHW manufacturer’s specifications, Armani planned to install the HTHW system above the storm sewer and sanitary water pipes at a depth of approximately five feet. (Tr. 16-18, 31-32, 38-40, 42-43, 52-53, 63, 67, 99, 112-13; R4, tab O)

The Corps issued a notice to proceed to Mack on 28 October 1993. Pursuant to the contract, Mack was to complete all work within 700 calendar days of receipt, *i.e.*, by 1 October 1995. Due to Modification Nos. P00001 through P00015, the Corps revised the price of the contract upward to \$6,883,036 and extended the completion date of contract work to 16 January 1996. (R4, tab D; stip. ¶ 2)

By letter dated 23 February 1994, Mack forwarded to the Corps letters that it had received from Armani requesting clarification of details for the HTHW and storm sewer lines, including depths of the HTHW system and the location of the storm sewer inverts (stip. ¶ 7; R4, tab J). The Corps’ resident engineer responded to Mack on 12 April 1994, after the storm sewer was partially constructed, by stating in writing that, among other things, “the high temperature hot water line is to be buried not less than 5 1/2 feet below finished grade” and, “[i]f any of these clarifications in your opinion have created a changed condition, you should notify this office in writing as required by Contract Clause 78, ‘Changes’” (stip. ¶ 8; R4, tab K; tr. 103-05). Because Armani believed that there was

only a six inch difference between the five foot depth it had anticipated in bidding and the five and a half feet set forth in the Corps' 12 April letter it did not protest the Corps' stated "clarification" upon its receipt of that letter (tr. 47-48, 64-66).

When Armani commenced planning installation of the HTHW system in August 1994, after the storm sewer had been completed, it realized that, if the HTHW lines were installed "not less than 5 1/2 feet below finished grade" as stated by the Corps' project engineer, the lines would conflict with the storm sewer already installed at that depth (tr. 43-45, 49-52, 68-70, 77-78; stip. ¶ 9). In order to install the HTHW lines in compliance with the Corps' 12 April directive, Armani would have to install more than 700 feet of line below the storm sewer at depths as great as 13 to 14 feet below grade (tr. 60-62, 83). Armani notified Mack of this problem, and Mack advised the Corps' project engineer that, in order to comply with the post-bid directive of at least five and a half feet of cover for the HTHW line, "the line was being put in quite a bit deeper than [Armani] had bid and that [Armani] would be looking for a change" (tr. 50, 85, 88-89, 125; stip. ¶ 14). The project engineer noted in his "daily log of construction" for 27 October 1994 in response to a preprinted question whether anything has "developed on the work which might lead to a change order or finding of fact" that "RFA being prepared because Contractor feels HTHW piping has to be deeper than anticipated during bid due to conflicts with storm pipe" (R4, tab P; stip. ¶ 14). The project engineer's supervisor, the resident engineer, reviewed and initialed this 27 October 1994 log on 30 October 1994 (R4, tab P; tr. 130, 132-33; stip. ¶¶ 12, 13).

Excavation for the HTHW system began in late October 1994 and was completed during November of 1994 (tr. 49, 59; stip. ¶ 11). On 28 November 1994, Armani sent Mack a claim for the cost of additional excavation and backfill with respect to the HTHW system and Mack forwarded the claim to the Corps on 10 January 1995 (stip. ¶ 15; R4, tabs Q, R; tr. 59). The Corps' project engineer drafted a response to the claim on behalf of the resident engineer, which was adopted by the resident engineer without any review of the contract drawings or other independent research (tr. 134-35, 141-43). By letter dated 8 May 1995, the resident engineer notified Mack that:

- a. The contract documents did not indicate elevations for the HTHW line. Paragraph 3.4 of section 02695 requires the Contractor to verify installed elevations against elevations shown on the contract drawings. . . . It was obvious during the bid process an important piece of information was missing. The subContractor Armani states his estimating department "sumimized" a cover of five feet over the HTHW line.

....

d. Key decisions regarding this issue were made without affording the Government the opportunity to participate. It is conceivable the HTHW line could have been installed at a higher elevation which would have placed it above the storm piping

e. By his actions the Contractor assumed the full risk for installing the HTHW line below the storm piping.

. . . [I]t is my opinion your request for adjustment has no merit. You are asked to withdraw your request If you desire to pursue this matter, you must request in writing that a Contracting Officer's determination be provided. Such a request should be sent to this office.

Mack completed the contract work during July 1995, six months ahead of schedule. (R4, tab S; stip. ¶ 17; tr. 56-57, 112, 135, 141-42)

By letter dated 16 November 1995, Mack requested that the contracting officer (CO), who was located in New York City, issue a determination regarding the HTHW system claim for \$96,248 pursuant to the contract's Disputes clause (R4, tabs C, T). The Corps' project engineer drafted findings of fact for the CO's final decision (tr. 98). On 26 April 1996, the CO issued a final decision denying the claim for reasons almost identical to those set forth in the resident engineer's 8 May 1995 letter to Mack (R4, tabs B, S; stip. ¶ 18).

Mack timely appealed the CO's decision to this Board (R4, tab A). During a one-day trial on entitlement conducted in Syracuse, New York, the Corps' project engineer testified that: he had been responsible for reviewing the contract drawings prepared by the Corps' architect and engineer to be sure they were "constructable"; he did not notice that the drawings did not contain any elevations for the HTHW system; in his experience, elevations for a HTHW system, unlike elevations for storm and sanitary lines, normally are not set forth on contract drawings because the HTHW contractor must do a "design layout" for the system since "the whole system is kind of an engineered piece of pipe from connection point to finish point in the building"; he saw HTHW systems installed at depths less than five and a half feet during the past 20 years; and it was "not imprudent" for Armani to have planned to install the HTHW system at a depth of five feet or less (tr. 100-01, 103, 107, 112-14, 126-28). The project engineer further testified that: the April 1994 letter to Mack setting forth a depth of not less than five and half feet for the HTHW system constituted "new information," which upon its face did not raise a concern of a conflict in the contract drawings between the HTHW and sewer lines; due to the April 1994 letter, he would not have approved Armani's profile had it shown installation of the HTHW system at a depth of less than five and a half feet; he could have investigated the possibility of installing the

HTHW system at a depth of less than five and a half feet after being apprised of the storm sewer conflict, but did not; he would have conducted such an investigation if the contractor had furnished him a letter setting forth the information he was presented orally; and the parties possessed identical information regarding the depth of the storm sewer lines (tr. 103-11, 117-18). The resident engineer, who supervised the project engineer, testified at trial that: five feet was a reasonable depth for Armani to install the HTHW system; his understanding is that HTHW systems are “a system type thing and that they need to be designed by a supplier” who would “determine the exact configuration, which would include elevations”; his April 1994 letter to Mack adopted the Corps’ “architect’s interpretation” that HTHW installation be at a depth of not less than five and half feet; his April letter did not constitute a “directive,” but a “clarification”; and Armani could have saved money had it installed the HTHW system at a depth of four feet, but he would not have allowed that installation because, even if it were possible, it would constitute a “deficiency” (tr. 144, 152-55, 158).

DECISION

Mack contends that it is entitled to an equitable adjustment of the contract amount because “the April 12, 1994, Government letter was a directive to the Contractor requiring [it] to install the HTHW system not less than 5 1/2 [feet] below grade” and, therefore, it “was compelled to install the HTHW system below, rather than above, the Storm Sewer which resulted in additional costs not projected at the time of bid” (app. br. at 2, 11-12; app. reply at 5). The Corps contends that Mack is barred from receiving an equitable adjustment because it failed to inquire about the elevation of the HTHW system prior to bidding. It asserts that: it is undisputed that the contract drawings do “not specify the depth at which the system is to be buried”; “it is well settled that a bidder faced with an ‘obvious omission, inconsistency, or discrepancy of significance’ must first consult with the Government’s representatives”; and “[l]ack of bury depths is an ‘obvious omission’ sufficient to deny relief” to a bidder who has not inquired about such an omission. (Gov’t br. at 4-11)

Under the circumstances here, however, we do not find an omission of bury depths to be an “obvious omission.” The parties’ contract expressly provided in paragraph 1.4 of specification section 02695 that the contract’s drawings “indicate [a] general pipe route only” and the “Contractor is responsible for submitting a detailed design layout prepared by the system supplier.” Both the Corps’ project engineer and his supervisor, the Corps’ resident engineer, testified that HTHW systems generally are designed by their supplier, who determines the elevations or bury depths for the systems. In fact, the Corps’ project engineer testified that, in his experience, elevations for HTHW systems generally are not set forth on contract drawings because “the whole system is kind of an engineered piece of pipe from connection point to finish point in the building” which requires a supplier “design layout.” In view of the contract language expressly requiring submission of a “detailed design layout” which would supplement the contract drawings indicating only a general pipe

route and the testimony of the Corps' own two engineers that such a layout generally is submitted for HTHW systems supplying the elevations or bury depths for the systems, it was reasonable for Mack to have construed the parties' contract as allowing it to supply bury depths or elevations for the HTHW system on the "detailed design layout" it was to furnish the Corps. *See Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 751 (Fed. Cir. 1999); *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1544 (Fed. Cir. 1993). The omission of such depths or elevations from the contract drawings, therefore, was not "obvious," "gross" or "glaring" so that the contractor had a duty to inquire about it at the start. *See, e.g., H & M Moving, Inc. v. United States*, 499 F.2d 660, 670-71 (Ct. Cl. 1974); *WPC Enterprises, Inc. v. United States*, 323 F.2d 874, 876-77 (Ct. Cl. 1963).

It was also reasonable for Mack to have construed the parties' contract as allowing use of an HTHW system elevation of approximately five feet. The HTHW manufacturer's specifications permitted installation at a depth as shallow as three feet and the frost line was not a significant factor due to the nature of the system. Moreover, both the Corps' project engineer and resident engineer testified that five feet was a reasonable depth to install the HTHW system. The Government's April 1994 post-award directive that Mack have HTHW system elevations "not less than 5 1/2 [feet] below finished grade" thus constituted a constructive change to the parties' contract. *See C. Sanchez and Son, Inc.*, 6 F.3d at 1543 (issue to be decided is whether contractor's interpretation was reasonable; if so, directive to proceed beyond contractor's interpretation may be viewed as a "constructive change"); *J.B. Williams Co. v. United States*, 450 F.2d 1379, 1394 (Ct. Cl. 1971) (same).

The Corps additionally contends in this appeal that Mack is barred from receiving an equitable adjustment based upon its failure to furnish "timely written notice" that it deemed HTHW system installation at a depth of "not less than" five and half feet to constitute a "change" to the contract. According to the Corps, while it is undisputed that its project engineer was told by Mack on 27 October 1994 that a request for adjustment was being prepared "because Contractor feels HTHW piping has to be deeper than anticipated during bid due to conflicts with storm pipe," that statement is not sufficient for us to "impute knowledge" to the Corps that Mack believed there was a constructive change. The Corps asserts it was prejudiced in not receiving "written" notice of the constructive change claim until January 1995 after the completion of HTHW work due to inability to investigate the claim and loss of right to consider alternatives to the action taken. (Gov't br. at 12-25) Mack contends that, on 27 October 1994, the Government had "actual knowledge of [its] intent to file a claim" and "knew [that it] was filing the claim for additional excavation due to a conflict between the storm sewer and the HTHW lines" (app. reply at 10 (emphasis deleted)). According to Mack, the Corps had every opportunity to investigate the claim and consider alternatives, "but chose not to do so" (app. br. at 13-14; app. reply at 6-15).

We found above that the Corps' project engineer noted in his 27 October 1994 "daily log of construction" in response to a printed question inquiring whether anything had "developed on the work which might lead to a change order or finding of fact" that an "RFA

[is] being prepared because Contractor feels HTHW piping has to be deeper than anticipated during bid due to conflicts with storm pipe,” and that the resident engineer contemporaneously reviewed this daily log. We further found that the project engineer believed he could have investigated the possibility of installing the HTHW system at a depth of less than five and a half feet after being apprised of the storm sewer conflict, and that he would have conducted such an investigation if Mack had furnished him a letter setting forth the information he was presented orally. The record accordingly establishes that the Corps’ project engineer understood Mack was seeking an equitable adjustment for a constructive change due to additional HTHW excavation based on a conflict with the storm sewer, and that his supervisor, the resident engineer, was also aware of this claim. The officials directly responsible, therefore, were fully aware of the operative facts. *See, e.g., Davis Decorating Service*, ASBCA No. 17342, 73-2 BCA ¶ 10,107 at 47,475.

The Government can be placed upon notice of a claim by being made “aware of the operative facts” thereof. *E.g., Hoel-Steffen Constr. Co. v. United States*, 456 F.2d 760, 768 (Ct. Cl. 1972); *C.M. Lowther, Jr.*, ASBCA No. 38407, 91-3 BCA ¶ 24,296 at 121,405. Where responsible Government officials are aware or should be aware of the facts giving rise to a claim, strict compliance with a contract’s written notice requirements is not required. *E.g., Central Mechanical Constr.*, ASBCA Nos. 29431, *et al.*, 85-2 BCA ¶ 18,061 at 90,657; *Davis Decorating Service*, ASBCA No. 17342, 73-2 BCA ¶ 10,107 at 47,475. Oral notice, as given by Mack here, may be furnished to responsible Government representatives. *See Central Mechanical Constr.*, ASBCA Nos. 29431, *et al.*, 85-2 BCA ¶ 18,061 at 90,659; *M.M. Sundt Constr. Co.*, ASBCA No. 17475, 74-1 BCA ¶ 10,627.

The burden is on the Government to establish that it was prejudiced by the absence of the required notice. This burden cannot be satisfied simply by allegation, but must be supported by evidence in the record. *M.M. Sundt Constr. Co.*, ASBCA No. 17475, 74-1 BCA ¶ 10,627 at 50,425. When the Government has knowledge of the underlying facts giving rise to a claim, it is unlikely it will be prejudiced in its investigation and defense thereof. *Id.* This is the factual situation here. The Corps’ project and resident engineers had knowledge of the contractor’s alleged over-excavation, as evidenced by the Corps’ daily report and testimony. The two engineers thus had an opportunity to investigate the claim and order alternative corrective action. *See, e.g., C&L Constr. Co.*, ASBCA Nos. 22993, 23040, 81-1 BCA ¶ 14,943 at 73,963.

In sum, the lack of HTHW system elevations or bury depths upon the contract drawings could reasonably be construed as allowing a contractor to supply the elevations upon its “detailed design layout” which was to be furnished the Corps, and was not an “obvious omission” giving rise to a duty to inquire. Installing the HTHW system at a depth of “not less than” five and a half feet was not among Mack’s work requirements, but extra work for which Mack should be paid under the Changes clause of the contract. While Mack did not protest the extra work in writing until January 1995, it orally advised the project engineer of extra HTHW excavation in October 1994 contemporaneously with the start of

that excavation. As a result, the two Corps officials directly responsible were aware of the over-excavation claim's operative facts. Strict compliance with the written notice requirement, therefore, was not required.

CONCLUSION

The appeal is sustained and remanded to the parties to negotiate quantum. If the parties are unsuccessful in resolving quantum, appellant may pursue further proceedings before this Board.

Dated: 18 September 2001

TERRENCE S. HARTMAN
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

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. 50035, Appeal of A.R. Mack Construction Co., Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services

