

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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R. J. Lanthier Co., Inc.) ASBCA No. 50471
)
Under Contract No. N62474-94-C-7380)

APPEARANCES FOR THE APPELLANT: Robert J. Marks, Esq.
P. Randolph Finch, Jr., Esq.
Marks & Golia, L.L.P.
San Diego, CA

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
John McMunn, Esq.
Senior Trial Attorney
Naval Facilities Engineering
Command
West Coast Litigation Team
San Bruno, CA

OPINION BY ADMINISTRATIVE JUDGE TUNKS

This appeal involves a dispute over the interpretation of the quality control provisions of a construction contract. The amount in dispute is \$380,540.83 and the real-party-in-interest is appellant's quality control subcontractor, Construction Testing and Engineering, Inc. (CTE). Only entitlement is at issue.

FINDINGS OF FACT

1. The Navy issued Invitation for Bids (IFB) No. N62474-94-B-7380 to construct Bachelor Officers Quarters (BOQs) at the Naval Air Station, Fallon, Nevada, on 11 May 1994 (R4, tab 1). The work included the construction of 13 masonry buildings: four three-story BOQs, three two-story BOQs, a mechanical building, a multipurpose building and four smaller buildings containing laundry rooms, lounges, exercise facilities and the like (tr. 2/9-11; ex. G-2).

2. The contract was issued under the Base Realignment and Closure (BRAC) program. The BRAC program requires the Department of Defense (DoD) to close designated military bases, giving rise to a need for new facilities to house displaced activities. Due to the urgency of the need, BRAC contracts are constructed on an accelerated basis. (Tr. 1/132-33, 218-19)

3. The contract included the standard FAR clauses for construction contracts, including FAR 52.243-4 CHANGES (AUG 1987) and FAR 52.233-1 DISPUTES (DEC 1991) - ALTERNATE I (DEC 1991) (R4, tab 1).

4. Paragraphs 1.5.1, 1.5.2 and 1.5.3 of specification section 01400 “Quality Control” provided, in part, as follows:

1.5 QC Organization

1.5.1 QC Manager

1.5.1.1 Duties

Provide a QC Manager . . . to manage . . . the QC program. The QC Manager is required to attend the Coordination and Mutual Understanding Meeting, conduct the QC meetings, perform submittal review, ensure testing is performed and prepare QC certifications and documentation The QC Manager is responsible for managing . . . the three phases of control and documentation performed by the QC specialists. No work or testing may be performed unless the QC Manager is on the work site. The QC Manager shall report directly to an officer of the firm and shall not be the same individual as, nor be subordinate to, the project superintendent or the project manager, or the project superintendent [sic].

. . . .

1.5.2 Alternate QC Manager Duties and Qualifications

Designate an alternate for the QC Manager

1.5.3 Assistant QC Manager Duties and Qualifications

Provide an assistant to the QC Manager . . . to assist the QC manager in the implementation of the QC program

(R4, tab 1)

5. Paragraph 1.5.4 of specification section 01400 “QC Specialists Duties and Qualifications” provided, in part, as follows:

Provide a separate QC specialist at the work site as specified below, who shall assist and report to the QC Manager and who shall have no other duties other than performing the three phases of control and preparing documentation required in this Contract. QC specialists are required to attend the Coordination and Mutual Understanding Meeting, QC meetings, perform the three phases of control and prepare documentation for each definable feature of work in their area of responsibility at the frequency specified below.

<u>Qualification/Experience in Area of Responsibility</u>	<u>Area of Responsibility</u>	<u>Frequency</u>
Civil Inspector: ACIA Certified or equal; w/10 years	Divisions 2, 3 & 4	Full time
Masonry Inspector: ACIA Certified or equal; w/10 years	Division 4	Full Time
Building Inspector: ACIA Certified or equal; w/10 years	Divisions 6, 8, 9, 10, & 12	Full Time
Roofing Inspector: ACIA Certified or equal; w/10 years	Division 7	Full Time
Mechanical Inspector: ACIA Certified or equal; w/10 years	Division 15	Full Time
Plumbing Inspector: AICA Certified or equal; w/10 years	Division 15	Full Time
Electrical Inspector: ACIA Certified or equal; w/10 years	Division 16	Full Time

ACIA = American Construction Inspectors Association

(R4, tab 1)

6. Paragraph 1.9 of specification section 01400 required that the “three phases of control” be performed for each “definable feature of work.” A “definable feature of work” is a task that is separate and distinct from other tasks and which requires separate control requirements. (R4, tab 1; tr. 1/23-30)

7. The first or preparatory phase required the QC Manager to meet with the QC specialists, the superintendent and the foreman prior to the start of each definable feature of work and review the following: (a) the applicable specification sections; (b) the contract drawings; (c) the shop drawings and submittals; (d) the testing plan; (e) the work area; (f) the required materials, equipment and sample work; (g) the safety plan; and (h) the construction methods. The preparatory phase was performed only once for each definable feature of work. (R4, tab 1, spec. section 01400 at ¶ 1.9.1; tr. 1/28)

8. The second or initial phase of control was conducted when the construction crews were ready to start work on a definable feature of work. This phase required the QC Manager to meet with the QC specialists, the superintendent and the foreman responsible for that definable feature of work and to perform the following: (a) establish the quality of workmanship required; (b) resolve conflicts; (c) review the safety plan; and (d) ensure that testing was performed by the approved laboratory. In addition, the QC Manager was required to observe the initial segment of the definable feature of work to ensure that it complied with the contract. This phase was repeated for each new crew or when the quality of the workmanship was unsatisfactory. (R4, tab 1, spec. section 01400 at ¶ 1.9.2; tr. 1/28-29)

9. The third or follow-up phase was performed daily or more frequently as necessary for on-going work until each definable feature of work was completed. The follow-up phase required the QC Manager to perform the following: (a) ensure that the work complied with the contract; (b) maintain the required quality of workmanship; (c) ensure that testing was performed by the approved laboratory; and (d) ensure that rework items were corrected. (R4, tab 1, spec. section 01400, ¶ 1.9.3)

10. The specification also required the QC specialists to prepare a report for each day that work was performed in their area of responsibility. Reports were to be prepared in accordance with detailed requirements set forth in the specification. (R4, tab 1, spec. section 01400 at ¶ 1.13 *et seq.*)

11. Specification section 04230 “Reinforced Masonry” stated, in part, as follows:

1.3.1 Inspection

Inspection is required for structural masonry. Coordinate details with Section 01400, "Quality Control."

1.3.1.1 Masonry Inspection

Employ a qualified masonry inspector approved by the Contracting Officer in addition to the Quality Control Representative to perform continuous inspection of the masonry work. Acceptance by a State or municipality having a program of examining and certifying masonry inspectors will be considered adequate qualification. The masonry inspector shall be at the site continuously during masonry construction.

(R4, tab 1)

12. The contract did not define the terms "full time" or "continuous."

13. In preparing its bid to appellant, CTE interpreted the contract to mean that it could use two to three inspectors with multiple certifications to cover the seven areas of responsibility listed in paragraph 1.5.4. CTE's estimate included \$132,000 for a QC Manager and an Assistant QC Manager and \$92,350 for QC specialists for a total of \$224,350. (Tr. 1/51, 54; ex. A-15)

14. Appellant relied on the bid submitted by CTE (tr. 1/230).

15. The Government estimate for the project, which was dated 6 May 1994, was \$14,663,000. Of that amount, 1 percent was for the Quality Control Program and \$78,540 was for the QC manager for a total of \$225,170. (Ex. A-18)

16. Appellant did not submit a prebid inquiry with respect to the QC provisions of the contract (tr. 1/5).

17. Bids were opened on 13 July 1994 and the Navy awarded the contract to appellant on 3 August 1994. At award, the contract price was \$14,994,183 and the contract completion period was 420 days. (R4, tab 1)

18. Appellant subsequently awarded a subcontract to CTE for QC services (tr. 1/231).

19. After award, appellant wrote the Navy as follows:

. . . [W]e do not interpret para. 1.5.4 as requiring seven separate full time inspectors. A full time specialist with multiple certifications might be used for more than one area of responsibility during the course of construction. The exception would be the Masonry Inspector, who will perform continuous inspection during masonry erection. [Emphasis in original]

(R4, tab 4)

20. On 22 February 1995, CTE sent a letter to appellant explaining its interpretation of the QC requirements. The letter provided, in part, as follows:

Project specifications state the following, “Provide a separate QC Specialist at the worksite as specified below who shall assist and report to the QC Manager. . . . The word “separate” means separate from the QC Manager. If the specifications truly intended that separate QC Specialists be provided for each category the word “specialist” would actually be plural, i.e. “specialists” not singular.

(R4, tab 13)

21. On 24 February 1995, appellant requested clarification of paragraph 1.5.4 (R4, tab 13).

22. On 24 February 1995, the Navy explained its position as follows:

. . . [T]he Government’s position continues to be that separate QC specialists are required by the Specification. We interpret the words “full time” . . . to indicate that the inspector cannot spend less than full time in his area of responsibility. This also precludes [an inspector from] inspecting, for instance, Plumbing and Electrical work at the same time. The Government would be amenable to allowing an inspector who has more than one specialty . . . for instance, Plumbing and Electrical to inspect either on days when only one discipline of work is being performed. [However], this person would only be allowed to inspect one discipline when both are taking place and a separate full time inspector would have to inspect the other.

(R4, tab 14)

23. On 17 March 1995, CTE agreed to provide a separate QC specialist for each of the seven areas of responsibility listed in paragraph 1.5.4 (R4, tab 15).

24. On occasion, the Navy allowed a QC specialist with dual certifications to inspect in more than his area of responsibility if work in his area was not on-going at the same time (R4, tab 14; tr. 1/59-60, 69; 2/50, 125-26)

25. On 24 January 1996, appellant submitted a certified claim to the contracting officer for \$380,540.83 for additional quality control specialists (R4, tab 38).

26. The contracting officer denied the claim on 15 October 1996, stating that the only reasonable interpretation of the specification was that appellant was required to provide a separate QC specialist for each area of responsibility (R4, tab 43).

27. Appellant appealed the denial of its claim to this Board on 6 January 1997.

DECISION

The issue in this appeal is whether or not the contract required appellant to provide a separate QC specialist for each of the seven areas of responsibility listed in paragraph 1.5.4 of the quality control section of the specification who was devoted exclusively each day to only one area of responsibility where work was being performed. Appellant argues that it reasonably interpreted the word “separate” to mean that the QC specialists had to be separate from the QC and Assistant QC Managers and the words “full time” to mean employment of QC specialists working a full rather than part day, not the continuous inspection of each area of responsibility where work was being performed. The Government argues that the only reasonable interpretation of the words “separate” and “full time” is that appellant must provide a QC specialist for each discipline of work or area of responsibility being performed who would inspect only one discipline or area per day.

A contract is ambiguous if it is susceptible to more than one reasonable interpretation. *Metric Constructors v. NASA*, 169 F.3d 747, 751 (Fed. Cir. 1999); *C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1544 (Fed. Cir. 1993). To show an ambiguity, it is not enough to demonstrate that the parties’ interpretations differ. Both interpretations must fall within a “zone of reasonableness.” *Metric*, 169 F.3d at 751. If both interpretations are within the zone, a latent ambiguity will be construed against the drafter under the rule of *contra proferentum*. If the ambiguity is patent, *e.g.* so glaring that it raises a duty to inquire, the contractor must have inquired about the ambiguity before bidding in order to avail itself of the rule of *contra proferentum*. *Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d 854, 860 (Fed. Cir. 1997); *Dalton v. Cessna Aircraft Co.*, 98 F.3d 1298, 1305 (Fed. Cir. 1996).

Appellant's interpretation is within the zone of reasonableness. Paragraph 1.5.4 provided, in part, as follows: "[p]rovide a separate QC specialist at the work site as specified below" In our opinion, the word "separate" could just as reasonably be interpreted to mean that the QC specialists could not serve as the QC or Assistant QC Manager as requiring seven separate QC specialists. Contrary to the Government's arguments, the term "full time" in paragraph 1.5.4 does not necessarily mean that the QC specialists were prohibited from working in more than one area of responsibility if properly certified. We must read the language of a particular contractual provision in the context of the entire agreement. *Dalton v. Cessna Aircraft*, 98 F.3d at 1305. Where the Government desired to have "continuous" quality control inspection of an area of responsibility, *i.e.*, with respect to masonry, it expressly stated in the contract that the contractor shall employ an inspector "to perform continuous inspection of the masonry work" and that the "inspector shall be at the site continuously during masonry construction." In our opinion, any ambiguity was latent: it was not so glaring as to give rise to a duty to inquire prior to bidding. Thus, appellant is not precluded from recovering because it failed to submit a pre-bid inquiry.

The appeal is sustained. Quantum is remanded to the parties. In the event the parties are unable to reach agreement on quantum, the contracting officer is directed to issue a final decision from which further appeal may be taken.

Dated: 2 August 2001

ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

TERRENCE S. HARTMAN
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. 50471, Appeal of R. J. Lanthier Co., Inc., rendered in conformance with the Board's Charter.

Dated:

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