

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
R. J. Lanthier Company, Inc.) ASBCA No. 51636
)
Under Contract No. N63387-90-C-6538)

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OPINION BY ADMINISTRATIVE JUDGE ELMORE
ON THE GOVERNMENT'S MOTION IN LIMINE

The Government has filed a Motion In Limine averring R. J. Lanthier Co., Inc. (RJL or appellant) when supplementing previous responses to the Government's first interrogatory request, added new issues which were not contained in the claim presented to the contracting officer (CO). The Government moved the Board to determine these new issues to be beyond the Board's jurisdiction and to bar RJL from presenting evidence on these new matters. Appellant has filed a response in opposition to the Government's motion.

FINDINGS OF FACT
FOR PURPOSES OF THE MOTION

1. On 10 April 1995 RJL was awarded Contract No. N63887-90-C-6538 to REPAIR GRAVING DOCK AND ELECTRICAL SYSTEMS FOR BUILDING 85, NAVAL STATION, SAN DIEGO, CALIFORNIA at the contract price of \$4,499,000.00. Subsequent modifications increased the contract price \$389,706.00. (R4, tabs 1, 28)

2. On 5 November 1997, RJL certified and forwarded to the Government its electrical subcontractor's, Neal Electric, Inc. (Neal), 28 October 1997 certified request for an equitable

adjustment (REA) in the amount of \$717,190.98 (R4, tabs 26, 27). RJL requested a written final decision within 60 days of the receipt of the claim. Neal's 28 October 1997 REA stated in pertinent part (R4, tab 26 at 2):

The Government failed to permit Lanthier, Neal and lower tier subcontractors to perform the specified work in accordance with its original schedule as a result of the *Government delaying, suspending and disrupting Neal's progress on the referenced project by, inter alia, by failing to provide complete and accurate Plans and Specifications, by providing Plans and Specifications which contained excessive numbers of errors, omissions and conflicts, by failing to provide timely direction regarding design conflicts, by providing overly ambiguous and vague directions, by providing conflicting directions, by failing to timely respond to requests for information, by failing to negotiate contract modifications timely, and by failing to acknowledge excusable time extensions requests thereby causing Neal and its suppliers and vendors to constructively accelerate the work.*

Neal's request is supported by the fact that the prolonged submittal review and design clarification process together with various disputes arising from the errors and omissions in the contract documents delayed and disrupted Neal's Switchgear supplier Beacon and its manufacturer GSI with respect to medium and low voltage switchgear fabrication. *The Government refused to extend the performance time for these delays, thereby accelerating Lanthier, Neal and lower tier subcontractors.* Specifically, the contract documents do not indicate that either amp transducers for 480 volt service mound switchboard or watt hour transducers for the medium and low voltage switchgear equipment are required. The Government insisted that they were.

(Emphasis added) The REA continued with a summary of meetings and correspondence relating to numerous issues affecting switchgear fabrication, not just the issues of the amp transducers and watt hour transducers. The REA was supported by 22 tabbed documents including meeting notes and correspondence.

3. On 9 April 1998 RJL acknowledged receipt of the CO's 7 April 1998 final decision denying RJL's certified REA (Bd. corr. file). The final decision in pertinent part stated the CO, after reviewing and carefully considering the REA, supporting documents, and the contract file had determined the contractor failed to show it was entitled to additional performance time due to excusable delay; there were no design issues or issues concerning

government conduct, identified in the REA, that would merit a contract extension; and that the Government did not delay the manufacturing of the switchgear equipment. (R4, tab 28)

4. RJL, by letter dated 7 July 1998 and received at the Board on 8 July 1998, appealed the CO's final decision (Bd. corr. file).

5. On 15 November 2001 the Board received the Government's 14 November 2001 Motion In Limine wherein the Government contended appellant's claim was for constructive acceleration allegedly suffered by its electrical subcontractor and lower-tier subcontractors; that only two specific issues, amp transducers for the 480 volt service mound switchboard and watt hour transducers for the medium and low voltage switchgear equipment, were alleged as the cause of the alleged acceleration; that RJL's counsel, in supplementing previous responses to discovery, "*introduced some 26 new specific issues in addition to the two identified in Appellant's Claim*";* that the operative facts relating to the additional 26 new specific issues were not set forth in appellant's claim; that the Board's jurisdiction is limited to matters that a contractor has first presented to the CO; and, accordingly, that the Board is requested to issue an Order in Limine barring appellant from presenting any evidence or argument in this appeal based on new matters over which this Board lacks jurisdiction. (Emphasis added) (Bd. corr. file)

6. Appellant's response in opposition to the Government's motion stated in pertinent part the Government's motion was brought to severely limit appellant's ability to present evidence; appellant's REA, denied by the CO, argued that the contract suffered from a poor design and contradictory specifications; that the shortfall in the contract specifications, coupled with the Government's repeated failure to reply to appellant's submittals in a timely manner, caused substantial delays in the preparation and manufacturing process; although the REA details some, though not all, of these items, it clearly states these assertions as the basis for its complaint; and the Government's motion "seeks to punish Appellant for summarizing some of the facts in its claim, and hopes to establish new law by requiring a claimant to state each and every fact supporting its right to bring an appeal in the original claim" (app. mem. dated 27 November 2001 at 2).

7. Our independent review of the REA reveals that it referenced, through the 22 tabbed documents, many if not all of the "new" issues. For example, the REA stated that a 27 September 1995 letter's comments "demonstrate that there are numerous unresolved items and that these items must be resolved prior to release of the equipment for production" (R4, tab 26 at 5). The 27 September 1995 letter, tab 12 of the REA, in turn referenced clarifications and exceptions relating to a credit for a potential transformer, the deletion of

* The Government's first set of interrogatories and appellant's supplemental responses were previously provided to, and have been reviewed by, the Board for purposes of issuing this decision. We note that the Government's motion lists 25, not 26, "new" issues.

certain voltmeter locations, and approval of gray wiring, all of which appear to be “new” issues (R4, tab 20).

DECISION

The crux of the Government’s motion is a request the Board determine that the response appellant provided in supplementing its original answers to the Government’s discovery requests raises new issues which were not a part of appellant’s original REA and, accordingly, are not jurisdictionally before the Board. The Government to have a tenable contention must show that admission of evidence relating to these issues would allow RJL to amend its claim or pleadings by raising allegations which the CO has not had an opportunity to analyze. *Trepte Construction Company, Inc.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595 at 113,385. In *Trepte*, we determined that the introduction of additional facts which do not alter the nature of the original claim before the Board, or the assertion of a new legal theory of recovery, when based upon the same operative facts as included in the original claim, do not constitute new claims. RJL’s REA, the final decision, the complaint, and the answer each speak to delay, disruption and defective specifications. To what extent RJL’s supplemental responses address these allegations is not evident from the Government’s motion. Suffice it to say the Board, based on the record before us, concludes the supplemented responses respond to the interrogatories and present a defense to the CO’s determination that no delay, disruption, nor defective specifications were encountered, and accordingly, do not alter the nature of the original claim before us. Furthermore, it appears the claim in fact referred, through its exhibits, to many if not all of the “new” issues.

The Government’s motion is denied.

Dated: 20 December 2001

ALLAN F. ELMORE
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. 51636, Appeal of R. J. Lanthier Company, Inc., rendered in conformance with the Board's Charter.

Dated:

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