

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
H. Bendzulla Contracting ) ASBCA No. 51869  
 )  
Under Contract No. F02601-96-D-C005 )

APPEARANCE FOR THE APPELLANT: Gerald J. Brentnall, Jr., Esq.  
Loomis, CA

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF  
Chief Trial Attorney  
CAPT Christopher J. Aluotto, USAF  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE YOUNGER

This appeal arises under a construction contract and appellant contends that a contracting officer's directive that it install cable television and telephone systems in the housing units that it was repairing constituted extra work. The parties principally dispute whether a prior course of dealing created an expectancy in a modification for the alleged extra work, and whether appellant's comments regarding anticipated discrepancies before issuance of the solicitation satisfied the duty to seek pre-bid clarification of patent ambiguities. Only entitlement is before us. We deny the appeal.

FINDINGS OF FACT

*A. The Phase V Contract*

1. By date of 30 September 1996, respondent awarded appellant contract No. F02601-96-D-C005 for the exterior repair of an estimated quantity of 72 Wherry family housing units at Davis-Monthan Air Force Base, AZ. The contract was for the fifth phase of this project, and the parties refer to it as the "Phase V contract." (R4, tab 1 at 2) The 72 houses fell into multiple types.

2. The contract contained various standard clauses, including FAR 52.236-21 SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984) (R4, tab 1 at 19 of 26). The contract also contained DFARS 252.236-7001 CONTRACT DRAWINGS, MAPS AND SPECIFICATIONS (DEC 1991) (*id.* at 22 of 26).

3. The contract also contained specifications, and it is undisputed that they made no express reference to the installation of cable television, telephone lines or outlets.

4. The contract contained an initial set of drawings that respondent furnished to prospective bidders (tr. 199). In this initial set, contract drawing 500-120 contained multiple sheets depicting the Phase V area of the Wherry housing at the Base. Sheet G-2 of the drawing contained General Note 5, which provided:

GENERAL CONTRACTOR SHALL COORDINATE BETWEEN CABLE T.V. AND TELEPHONE COMPANY FOR DISATTACHMENT AND REATTACHMENT OF THEIR RESPECTIVE CABLES FROM SIDES OF HOUSING UNITS. CABLE TV AND TELEPHONE SYSTEMS SHALL REMAIN IN OPERATION DURING ANY CONSTRUCTION IN THIS PROJECT. SEE DET. 2, SHT. A-19

Sheet G-2 also contained General Note 14, which provided:

INSTALL ADDITIONAL CABLE TV AND TELEPHONE OUTLETS AS SHOWN ON THE FLOOR PLAN. DO NOT USE CABLE TELEVISION SPLITTER. PROVIDE SINGLE WIRE TO EACH CABLE OUTLET.

(*Id.*, tab 20 at G-2)

5. Sheet G-2 also contained a legend explaining symbols appearing later in contract drawing 500-120. Three symbols are relevant here. The first directed the contractor where to “INSTALL CABLE TV OUTLET 18” A.F.F. [above finished floor].” The second directed the contractor where to “INSTALL TELEPHONE OUTLET 18” A.F.F.”. The third directed the contractor where to “INSTALL TELEPHONE WALL OUTLET 54” A.F.F.” (*Id.*, tab 20 at G-2; tr. 81)

6. Sheet A-19 of the drawing contained Detail 2, ELEVATION OF CABLE TV AND TELEPHONE SERVICE, which was referenced in General Note 5 (*see* finding 4). It contained two notes, the first of which stated: “TWO CONNECTIONS REQUIRED. ONE FOR CABLE TV AND ONE FOR TELEPHONE.” The second note referred back to General Note 14 “FOR ADDITIONAL INFORMATION.” Detail 2 depicted a square with an arrow and the notation “SCREW COVER WEATHER PROOF CANS: 8” X 8” X 4” FOR CABLE TV 12” X 12” X 4” FOR TELEPHONE.” The detail also depicted only a single conduit and a single box for television and telephone. (*Id.*, tab 20 at A-19; tr. 187-88)

7. Thirteen sheets in the initial set of contract drawing 500-120 contained the floor plans for the different types of houses involved in contract performance. On each of these sheets, the floor plan bore the words, “NO INTERIOR WORK.” (*Id.*, tab 20 at A-1 through A-5, A-9, A-10, A-14, A-14.1, A-16 through A-19) (underscoring in original) We find that eleven of these sheets also contained symbols on the floor plans directing the contractor where to install either cable television or telephone outlets (*id.*, tab 20 at A-2, A-4, A-5, A-

10, A-14, A-14.1, A-16 through A-19). No such symbols were visible on the remaining sheets, including on floor plan 2A (*id.*, tab 20 at A-1; tr. 114-15, 116-17; *see* finding 5).

8. The contract also included a second set of drawings that respondent issued to prospective bidders. In this second set, contract drawing 500-120 bore no indication that it was issued as a revision of the first set, and we find that respondent did so because some potential bidders complained of difficulties in reading details on the first set (tr. 170, 197-98). We further find that the contracting officer did not amend the solicitation when he issued the second set (*see* tr. 197-198).

9. We find that the second set of drawings differs from the first set of drawings (tr. 197, 198, 205-06). In particular, we find that, while the two sets contained identical text for General Notes 5 and 14, and for Detail 2 on Sheet A-19 (*see* findings 4, 6; R4, tab 18 at G-2, A-19), the second set also contained thirteen sheets with the floor plans for the different types of houses involved in contract performance. On each of these thirteen sheets, however, the floor plan bore the words, “NO INTERIOR WORK EXCEPT AS NOTED.” (R4, tab 18 at A-1 through A-5, A-9, A-10, A-14, A-14.1, A-16 through A-19) (underscoring in original). In addition, we find that all thirteen of these sheets contained symbols on the floor plans directing the contractor where to install either cable television or telephone outlets. (*Id.*, at A-1 through A-5, A-9, A-10, A-14, A-14.1, A-16 through A-19)

#### B. Appellant’s Bid on the Phase V Contract

10. We find that, two years before issuance of the solicitation for the Phase V contract, at a meeting with respondent’s personnel in 1994, and thereafter, in conversations with the inspector during performance of the Phase IV contract (*see* finding 17), Mr. Bendzulla urged respondent to alter future plans and specifications regarding wiring the units for cable television and telephone systems. With respect to his conversations with the inspector, Mr. Bendzulla testified that he

told him numerous times. I said “Change the specification as the next phase comes out, Phase No. 5. I would bid the job as I can read it.”

....

I went into it several times. I don’t know when. But I told him that the specifications, there should be specifications written. There should be a section pertaining to telephone cable work and cable television work, and there should be clarification on the drawings and the references, especially the interior work. . . .

(Tr. 36-37)

11. Following submission of appellant's bid, respondent requested bid verification, which appellant furnished by letter to respondent dated 26 September 1996 (R4, tab 6). We find that neither the bid nor the bid verification contain any qualification or any other mention of discrepancies in the specifications or drawings.

12. We find that, in preparing its bid, appellant relied upon the initial set of contract drawings that respondent furnished to bidders (tr. 44-45, 99; *see* findings 4-7). We further find that, other than the initial set of drawings, appellant failed to produce any bid working papers (tr. 34).

13. We find that, during the bidding process, appellant did not make, and the contracting officer did not receive, any request for clarification of discrepancies that appellant noticed in the drawings (tr. 123-24, 171). At trial, Mr. Bendzulla testified that he was "[v]ery familiar" with the rules governing Federal contracting (tr. 65). He further testified that he noticed the following discrepancies in the drawings:

(a) the prohibition on the use of a cable television splitter, and the direction to provide a "SINGLE WIRE TO EACH CABLE OUTLET" in General Note 14 (*see* finding 4) "left a lot of question [*sic*] open. . . . The wire was a question mark" (tr. 53);

(b) Detail 2 on Sheet A-19 (*see* finding 6) "tells me nothing. It only shows a picture of a drawing, an incomplete drawing, which doesn't say what it is." To be understood, the drawing should be keyed to a specification "[a]nd then it should say 'typical,' . . . . It doesn't say typical on there" (tr. 55);

(c) Detail 2 is not accurate (tr. 56);

(d) Detail 2 "only shows one three-quarter inch whatever. Conduit C. It doesn't say conduit. It doesn't even say what material it is" (tr. 57);

(e) Detail 2 "doesn't not [*sic*] mean or say anything in specifics for any contractor to determine that the government wants a wiring system installed that would provide all the wires in the attic, and into the rooms, down the wall. . . . [I]t doesn't say anything" (tr. 57);

(f) when he received the initial set of drawings, he knew that the words "NO INTERIOR WORK" appearing on the floor plans (*see* finding 7) were incorrect (tr. 82);

(g) in bidding, he was untroubled by the absence of symbols on floor plan 2A indicating where to install outlets (*see* finding 7) because

I tell you the truth, I didn't pay any attention. Even if they wouldn't be on the floor plans I would install them anyway because in the majority they were installed on all the other floor plans [and it] was an oversight, a minor oversight by the government, and since I'm such a nice guy, I would have installed them anyway;

(Tr. 115)

(h) the plans and specifications "didn't tell me how to hook . . . up" the cable television and telephone systems from the exteriors of the houses (tr. 120-21).

### *C. Performance of the Phase V Contract*

14. On 7 November 1996, after contract award (*see* finding 1), the parties held a pre-construction conference. A Government memorandum of the same date and signed by the contracting officer recites that the following comments were made:

Page 2 of 17 of the contract drawings lists cable TV outlets, telephone outlets and telephone wall outlets that are to be installed by the contractor. There is no section in the contract specifications that refers to the installation of these items. Mr. Bendzulla asked if the specifications will be modified to include these sections. . . . [T]he Project Engineer[] said he did not believe it was necessary because the cable TV and telephone companies have specifications on how these items are to be installed. Mr. Bendzulla indicated he did not include the installation of these items in his bid. I told Mr. Bendzulla I would check with the Contracting Officer . . . and respond to his question.

(R4, tab 7 at 6)

15. By letter to appellant dated 8 November 1996, the contracting officer responded to Mr. Bendzulla's question at the pre-construction conference, stating that "[p]age two of the drawings clearly requires [appellant] to install cable TV outlets, install telephone outlets, and install telephone wall outlets" (R4, tab 8). Appellant responded that it would proceed with the work, reserving the right to file a claim (*id.*, tab 9). While the contracting officer's directive was confined to outlets, appellant thereafter wired the units for cable television and telephone (tr. 57-58).

### *D. Claim and Appeal*

16. By letter dated 13 July 1998, appellant submitted an uncertified claim for \$96,182.37, representing extra costs allegedly incurred in complying with the contracting officer's directive to install cable television conduit, distribution boxes, cable and associated hardware (R4, tab 10). Thereafter, by decision dated 26 August 1998, the contracting officer denied the claim (R4, tab 11). Appellant then brought this timely appeal.

*E. The Phase IV and Predecessor Contracts*

17. Before the Phase V contract, respondent awarded contract No. F02601-95-D-0006, referred to as the Phase IV contract, to a joint venture that included appellant. The contract was for the repair of other Wherry housing units at the Base (tr. 18). The record does not contain the specifications for the Phase IV contract, but does contain the as-built drawings. While there is testimony that the requirements for the Phase IV and the Phase V contracts were identical in all material respects (tr. 11, 13, 21, 51), we find that the two contracts differed at least in the respects set forth below (*see* findings 18-20).

18. Contract drawing 500-116 for the Phase IV contract contained multiple sheets depicting the units involved in the Phase IV area of the Base. Sheet G-2 of the Phase IV drawings contained General Note 14. By contrast to General Note 14 on the Phase V drawings (*see* finding 4), however, the same Note on the Phase IV drawings only provided :

INSTALL ADDITIONAL CABLE TV AND TELEPHONE OUTLETS AS  
SHOWN ON THE FLOOR PLAN.

(R4, tab 13 at G-2; *see also* tr. 52-53)

19. The Phase IV contract also contained four bilateral modifications relating to the installation of cable television and telephones (tr. 35, 203), as follows:

(a) Modification No. 01 to delivery order 5001, effective 21 December 1994, provided that appellant was to "INSTALL TELEPHONE AND TV CABLE LINES TO 50 UNITS LISTED" on a referenced document;

(b) Modification No. 01 to delivery order 5002, effective 21 December 1995, pertained to 50 other units and contained terms identical to those in the first modification;

(c) Modification No. P00002 to the contract, effective 13 August 1996, in pertinent part required appellant to "[d]elete Cable TV splitter and provide wire to each cable outlet";

(d) Modification No. P00003 to the contract, effective 10 September 1996, required appellant to "[i]ninstall telephone and cable television outlets to each bedroom, living room

and kitchen” in specified units and to “[i]nstall telephone and cable weatherproof boxes” in accordance with an attached detail.

(R4, tabs 14, 15, 16, 17 at 4; tr. 83-85, 87-89, 201-02) Mr. Bendzulla testified, and we find, that, following the issuance of the first two modifications, appellant wired the outlets in the units, connected the cable and telephone systems, and installed weatherproof exterior boxes to the sides of the units (tr. 84-86, 140).

20. We find that the last two sentences in General Note 14 of the Phase V contract drawings (*see* finding 4) are taken substantially from the quoted terms of Modification No. P00002 to the Phase IV contract (*see* finding 19(c)). We further find that Detail 2 on sheet A-19 of the Phase V contract (*see* finding 6) is identical to the detail accompanying Modification No. P00003 of the Phase IV contract (*see* finding 19(d)), and that the legends appearing on Detail 2 are identical to those on the detail attached to that modification except for the addition of a referential note citing to General Note 14 for further information (*see* finding 6; R4, tab 1 at 1; tab 17 at 4; tab 18 at A-19; tab 20 at A-19; tr. 91-94, 98-99).

21. The record does not contain two previous contracts, referred to as the Phase III contract and the Phase II contract, respectively. Mr. Bendzulla testified that the Phase III contract was “similar” to the Phase IV and Phase V contracts (tr. 66), and an inspector testified that, to the best of his knowledge, the specifications and drawings on the Phase II contract “would have been the same” as those on the Phase IV contract (tr. 162), but we do not find this conclusory testimony by either witness probative.

### DECISION

Appellant principally argues that the contracting officer’s directive to install cable television conduit, as well as distribution boxes and associated hardware in the 72 housing units included in the Phase V contract, constituted a constructive change. Relying chiefly upon *Gresham & Co., Inc. v. United States*, 470 F.2d 542 (Ct. Cl. 1972), appellant stresses that respondent’s issuance of modifications to cover wiring the units in the Phase II, III and IV contracts established a course of dealing on which appellant had the right to rely, and did rely, in preparing its bid. (Brief of Issues and Law Following Trial (App. br.) at 3-6, 11-13) Appellant further urges that its interpretation of the contract was reasonable, and that it notified respondent of its interpretation before bidding (*id.* at 6-11). Finally, appellant argues that respondent is equitably estopped “from disputing Appellant’s claim” (*id.* at 13-14).

While failing to address appellant’s *Gresham* argument, respondent counters that the Phase V contract unambiguously required appellant to install the cable television and telephone systems. (Respondent’s Post Hearing Brief at 20-27) Alternatively, respondent contends that, if the contract is ambiguous regarding cable television and telephone

installation, then the ambiguity was patent, requiring pre-bid clarification (*id.* at 28-34). Finally, respondent argues that appellant has failed to establish bid reliance, an essential element of an ambiguity claim (*id.* at 34-37).

We conclude that the appeal must be denied. We reach this conclusion for three principal reasons, as set forth below.

*First*, the Phase V contract was patently ambiguous, raising a pre-bid duty to inquire. It is familiar that, if an ambiguity is “obvious, gross [or] glaring,” then it is patent. *H & M Moving, Inc. v. United States*, 499 F.2d 660, 671 (Ct. Cl. 1974). Although we treated the ambiguity as latent for purposes of summary judgment, *H. Bendzulla Contracting*, ASBCA No. 51869, 00-1 BCA ¶ 30,803 at 152,075, we reach a different conclusion with a fuller record.

While the contracting officer’s directive, and much of the skirmishing that preceded it, focused only on the installation of outlets (*see* findings 14, 15), appellant sought recompense in its claim for rewiring the houses for cable television and telephones (finding 16). On that issue, the specifications themselves are silent (finding 3), but the standard Specifications and Drawings clause (*see* finding 2) confers equal dignity upon “[a]nything . . . shown on the drawings and not mentioned in the specifications.”

At the time of bidding, appellant employed the initial set of drawings (finding 12). While he issued a second set of drawings that was different from the initial set (findings 8, 9), the contracting officer failed to amend the solicitation (finding 8), and hence appellant was not bound by the second set. *See* FAR 14.208 (changes to invitation for bids must be by amendment); FAR 14.301 (bid must comply in all material respects with invitation for bids).

The initial set of drawings gave bidders contradictory directions. While it directed bidders in General Note 14 both to “INSTALL . . . OUTLETS AS SHOWN ON THE FLOOR PLAN,” and to “[P]ROVIDE SINGLE WIRE TO EACH CABLE OUTLET,” it also repeatedly directed bidders on the floor plans themselves to perform “NO INTERIOR WORK” (findings 4, 7). In addition, on eleven of the thirteen floor plans, alongside the prohibition on interior work, there were symbols showing where to install cable television and telephone outlets (finding 7). These discrepancies alone, repeated multiple times on the drawings employed by appellant in bidding, were so “obvious, gross [or] glaring,” *H & M Moving, supra*, 499 F.2d at 671, that “a reasonable contractor would have perceived [them] in studying the bid packet.” *Triax Pacific, Inc. v. West*, 130 F.3d 1469, 1475 (Fed. Cir. 1997). Hence, the contract was patently ambiguous.

The issue then becomes whether appellant discharged its pre-bid duty to “inquire of the contracting officer as to the true meaning of the contract before submitting a bid.” *Id.*; *see also H. Bendzulla Contracting, supra*, 00-1 BCA at 152,075. Here, the duty arises

both because the contract was patently ambiguous and because appellant had actual knowledge that the prohibition on interior work was incorrect (finding 13(f)), as well as actual knowledge of other discrepancies (findings 13(a)-(e), (g), (h)). Appellant argues that it discharged its pre-bid inquiry duty because Mr. Bendzulla advised respondent before issuance of the Phase V solicitation of deficiencies in the Phase IV contract, and “[t]he cases do not state when prior to bidding the duty arises or when, prior to bidding, it must be satisfied.” Appellant insists that “[t]o require such notice to be provided after issuance of the solicitation and before submitting the bid would be to put form over substance.” (App. br. at 10) (emphasis in original)

We reject this proposition. We do not agree that gratuitous comments or advice regarding a hypothetical future solicitation satisfy the pre-bid duty to seek clarification. Appellant’s position cannot be harmonized with the standard Specifications and Drawings clause (*see* finding 2), which contemplates a “discrepancy in the figures, in the drawings, or in the specifications” that actually exist, not those that may exist in the future. Appellant’s position also cannot be harmonized with the standard Contract Drawings clause (*see id.*), which requires notification regarding discrepancies in “all drawings furnished.” Mr. Bendzulla first delivered his thoughts to respondent at a meeting in 1994, two years before issuance of the Phase V solicitation (finding 10). He then expressed his views to the inspector during performance of the Phase IV contract (*id.*). In neither situation did Mr. Bendzulla “inquire of the contracting officer as to the true meaning of the contract,” *Triax, supra*, 130 F.3d at 1475. The same is true of the interval between issuance of the solicitation and bid, when appellant had actual knowledge of discrepancies, but failed to call any of them to the contracting officer’s attention (findings 13(a)-(g)).

*Second*, we disagree that this case is controlled by *Gresham*. The court there held that “a contract provision for the benefit of a party becomes dead if that party knowingly fails to exact its performance, over such an extended period, that the other side reasonably believes the requirement to be dead.” *Gresham, supra*, 470 F.2d at 554. Fifteen contracts for dish washing machines were in dispute in *Gresham*; they were preceded by twenty-one others not in dispute. All were “under the same specification” calling for the machines to be fitted with automatic detergent dispensers. *Id.* at 556. The court concluded that the Government’s acceptance of machines on the 21 earlier contracts without dispensers reasonably led the contractor to believe that “enforcement of the requirement had been suspended and in effect, it was waived until further notice.” *Id.* at 554.

*Gresham* is not dispositive here because all the contracts there were “under the same specification.” *Gresham, supra*, 470 F.2d at 556. By contrast, here there are differences between the Phase V and Phase IV contracts. While appellant insists that it had a right to rely in Phase V on the fact that “[o]n four separate occasions the [Phase IV] contract was modified to provide extra compensation for rewiring the houses for cable TV and telephone” (app. br. at 3), it is unclear what provisions appellant’s desired modifications of the Phase V contract would include. At execution, the Phase V contract already

incorporated the principal terms of the Phase IV contract modifications. The direction in General Note 14 of the Phase V drawings, “DO NOT USE CABLE TELEVISION SPLITTER” (finding 4) corresponds to the direction regarding splitters in Modification No. P00002 to the Phase IV contract (findings 19(c), 20). General Note 14 also incorporated the direction to “PROVIDE SINGLE WIRE TO EACH CABLE OUTLET,” which added only the word “SINGLE” to the direction in Modification No. P00002 to the Phase IV contract (finding 20). Detail 2 of the Phase V drawings was identical to the drawing that accompanied Modification No. P00003 to the Phase IV contract, and the wording was identical, save for the second note, which referred to General Note 14 (*id.*). Despite appellant’s argument that respondent’s “conduct established a significant course of dealing between the parties, over a long period of time, and could reasonably have been relied upon by Appellant” to result in issuance of “the expected modifications” (app. br. at 4, 6), the inclusion of these modification provisions in the Phase V contract as executed leaves open the question of what further modifications would contain.

*Third*, we reject appellant’s equitable estoppel argument. As applied here, appellant must establish the following four elements: (1) respondent must know the facts; (2) respondent must intend that the conduct will be acted upon, or it must so act that appellant has a right to believe that the conduct in question was so intended; (3) appellant must be ignorant of the true facts; and (4) appellant must rely on the conduct to its prejudice. *E.g.*, *Advanced Materials, Inc. v. Perry*, 108 F.3d 307, 311-12 (Fed. Cir. 1997); *Craft Machine Works, Inc.*, ASBCA No. 47457, 98-1 BCA ¶ 29,467 at 146,264. Detailed analysis is unnecessary. Regardless of the first two elements, appellant cannot prevail on the third and fourth elements when it knew of discrepancies before bidding and failed to raise them with the contracting officer and, in one instance, “didn’t pay any attention” to drawing deficiencies (finding 13).

#### CONCLUSION

The appeal is denied.

Dated: 16 November 2001

---

ALEXANDER YOUNGER  
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. 51869, Appeal of H. Bendzulla Contracting, rendered in conformance with the Board's Charter.

Dated:

---

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