

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Elter S.A.) ASBCA No. 52327
)
Under Contract No. N33191-96-C-0716)

APPEARANCES FOR THE APPELLANT: Mr. Dimitrios Messadakos
President & Managing Director
Mr. Vassilios Messadakos
Vice President
Theodor Salichos, Esq.
Member of the Piraeus-Greece Bar

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
John S. McMunn, Esq.
Senior Trial Attorney
Naval Facilities Engineering
Command,
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OPINION BY ADMINISTRATIVE JUDGE HARTY

The subject contract is a firm fixed-price contract, payable in Greek drachmas, for multiple construction projects at Souda Bay, Crete, Greece, in support of the United States Navy. This appeal arises under the Contract Disputes Act from a contracting officer's final decision denying the claim of Elter S.A. (Elter) for additional costs and a time extension in connection with removing and replacing admittedly non-conforming light pole anchor bolts. We deny the appeal because we conclude that the Government's approval of Elter's exterior lighting submittal did not constitute an authorization to furnish anchor bolts that did not conform to contract requirements.

FINDINGS OF FACT

Background

The Department of the Navy, Engineering Field Activity Mediterranean Contracts Office, Souda Bay, Crete, awarded Contract No. N33191-96-C-0716 to Elter on 28 September 1996 for multiple construction projects at the U.S. Naval Support Activity, Souda Bay, Crete, Greece on a firm fixed-price basis, payable in Greek drachmas.

The contract incorporated provisions typical in overseas construction contracts, including: FAR 52.233-1 DISPUTES (OCT 1995) - ALTERNATE I (DEC 1991); FAR 52.243-4 CHANGES (AUG 1987); FAR 52.236-5 MATERIAL AND WORKMANSHIP (APR 1984); FAR 52.236-21 SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984) - ALTERNATES I, II (APR 1984); FAR 52.211-13 TIME EXTENSIONS (OCT 1995); FAR 52.214-34 SUBMISSION OF OFFERS IN THE ENGLISH LANGUAGE (APR 1991); FAR 52.225-14 INCONSISTENCY BETWEEN ENGLISH VERSION AND TRANSLATION OF CONTRACT (AUG 1989); and a choice of law provision choosing U.S. substantive law in the event of a dispute. (R4, tab 6)

Contract project P-500 called for the construction of a bowling center, including a parking lot. Elter was required to install exterior lighting in the parking lot. Paragraph 2.6, Pole Foundations, of contract specification section 16530, entitled "Exterior Lighting," provided that: "Anchor bolts shall be steel rod having a minimum yield strength of 50,000 psi; the top 12 inches of the rod shall be galvanized in accordance with ASTM A 153. Concrete shall be as specified in section 03300, 'Cast-in-Place Concrete.'" Paragraph 3.1.1 of the same section stated: "Provide pole foundations with galvanized steel anchor bolts, threaded at the top end and bent 90 degrees at the bottom end. Provide galvanized nuts, washers, and ornamental covers for anchor bolts." (R4, tab 8, vol. 2 at § 16530, ¶ 3.1.1) Contract drawing E-8, Pole Foundation, Note 8, states: "FOUR (4) 1" X 1.00M HOT DIPPED GALVANIZED STEEL ANCHOR BOLTS FURNISHED WITH THE POLE. QUANTITY AND MOUNTING ON BOLT CIRCLE SHALL BE AS REQUIRED BY THE POLE FURNISHED." (R4, tab 24)

Paragraph 1.4 of specification section 16530 required submittals for the exterior lighting system, including the poles. Manufacturer's catalog data was required. Paragraph 1.4.2.2 required the inclusion of dimensions, wind load determined in accordance with the manufacturer's recommendations, pole deflection, pole class, and other applicable information. (R4, tab 8)

Specification section 01300, entitled Submittals, made the Material and Workmanship clause and paragraphs (d), (e) and (f) of the Specifications and Drawings for Construction clause specifically applicable to all submittals. "Submittal" was defined as shop drawings, product data, samples and administrative submittals presented for review and approval. Paragraph 1.5.4, Variations, of section 01300 provided that variations from contract requirements required Government approval pursuant to the Specifications and Drawings for Construction clause and would be considered if advantageous to the Government. The contractor was required to identify the proposed variation separately and include the documentation for the proposed variation along with the required submittal for the item. Paragraph 1.5.6(c) placed responsibility on the contractor for advising the contracting officer of any proposed variation. (R4, tab 7)

By submittal R500/148, dated 28 August 1997, Elter provided the required submittal for the planned exterior lighting for Government approval. The submittal included a

certification that the proposed material was in compliance with the specifications and drawings. No variation from contract requirements was noted. The submittal was approved on 9 September 1997 by Mr. Wayne Uhl, the project engineer, acting on behalf of the Navy. With respect to the light poles, Mr. Uhl made the following comment: "PETIJEN POLES (PARKING LIGHTING) APPROVED. HOWEVER, POLE TYPE TO BE ABLE TO SUPPORT TWO LIGHTING FIXTURES AT THE SPECIFIED WIND VELOCITY." (R4, tabs 18, 24; tr. 688-90)

During the 4 February 1998 through 21 February 1998 time period, Elter completed the light pole foundations. After this effort was complete, the Navy discovered that Elter had deviated from the contract requirements in at least two important respects: first, the poles were not supported by hot dipped, galvanized steel anchor bolts; and second, although the anchor bolts met the minimum yield strength requirement of 50,000 psi, the diameter of the anchor bolts was 18mm (11/16 inch) instead of the required one inch. (The anchor bolts also did not meet the length requirement, but this fact has not been made an issue here.) (R4, tab 20; ex. G-23; tr. 690, 699-702, 707-709) By letter dated 19 March 1998, Mr. Uhl advised Elter of the deviations and also noted that a preparatory inspection was not performed prior to installing the pole foundations. Elter was directed to remove the non-conforming foundations and install conforming foundations or to provide an alternative proposal. (R4, tab 20)

By letter of 26 March 1998, Mr. Paraskakis, Elter's site superintendent, proposed to cold galvanize the top 12 inches of the anchor bolts. With respect to replacement of the anchor bolts, Elter's letter included a certification from the manufacturer that the JT 20/18 x 400 anchor bolts supplied with the PETITJEAN Omega 2489, 9-meter poles were "suitable for this kind of material." Mr. Paraskakis emphasized that the anchor bolts had been approved along with the light poles when the Government approved Elter's exterior lighting submittal on 9 September 1997. He indicated a claim would be forthcoming if Elter were required to replace the installed anchor bolts. (R4, tab 20)

The Navy was unwilling to accept Elter's proposed solution and insisted on anchor bolts that fully complied with the specification, particularly the one-inch diameter dimension requirement. We note in this regard that while the manufacturer considered the anchor bolts that were initially installed suitable, its product data shows that it offered anchor bolts that would have satisfied the requirements when bent 90 degrees. (R4, tab 18) At a jobsite meeting on 26 March 1998 Elter was instructed to remove the foundations and install anchor bolts that conformed to the contract requirements. Elter was also told that the Government would not pay for the replacement of the light-pole foundations. (R4, tab 21) Elter ultimately complied with the direction.

The testimony at the hearing underscored the Government's belief that the light poles at the bowling center as installed by Elter were not safe. The contracting officer testified that before ordering the removal and replacement of the foundations consideration

was given to whether the work could be accepted. The conclusion was that the anchor bolts might not be able to withstand the winds during a winter storm at Souda Bay. Although the anchor bolts met the minimum 50,000 psi strength requirements of the specifications, the anchor bolts did not meet the drawing's dimension requirements, which were considered critical to the actual strength of the anchor bolts. The Navy was unwilling to take the risk and insisted instead on compliance with the contract requirements. (R4, tabs 20, 22; tr. 688-92, 701, 704-07, 712-133)

Elter's Claim

By letter dated 10 May 1999, Elter filed a claim seeking 4,606,858 drachmas for the cost of removal and reconstruction of the light-pole foundations and a time extension of 25 days. It argued that the Navy's approval of its exterior lighting submittal constituted acceptance of its proposed exterior light poles, including the anchor bolts recommended by the manufacturer. (R4, tab 24; tr. 691) By final decision dated 8 June 1999, the contracting officer, Engineering Field Activity Mediterranean, Naples, Italy, denied the claim (R4, tab 25; tr. 691). Elter subsequently filed a timely appeal.

DISCUSSION

Elter has not argued that the anchor bolts it initially used complied with contract requirements. The anchor bolts did not meet the one-inch diameter requirement and were not galvanized. Instead, Elter's defense before the Board continues to be grounded on the effect of the Government's approval of its lighting installation submittal. It also argues that the manufacturer's data indicated that anchor bolts of the type initially used would be appropriate for the poles selected.

Elter certified conformance with contract requirements and failed to point out the anchor bolt deviations from contract requirements. The Specifications and Drawings for Construction clause provides in the context of this contract that the contractor must review and approve submittals for accuracy, completeness and compliance with contract requirements. Subsequent approval of the submittal by the contracting officer does not relieve the contractor from responsibility for complying with the contract requirements, unless variations from the contract requirements are described in writing and approved by the contracting officer. Paragraph 1.5.4 of section 01300 spelled out in detail the requirements for presenting a variation from contract requirements to the Government for review and approval. Paragraph 1.5.6(c) made it clear that it was the contractor's responsibility to advise the contracting officer of any variation.

Under the contract it was Elter's responsibility to notify the Government of the deviation. Without notice of a deviation from the contract requirements, approval of a submittal does not relieve a contractor from complying with contract requirements. *See NewRic Construction Company, Inc.*, ASBCA No. 31635, 86-3 BCA ¶ 19,035; *Community Science Technology Corp., Inc.*, ASBCA No. 20244, 77-1 BCA ¶ 12,352. The

Government's approval of the submittal did not constitute a waiver of the contract requirements. Moreover, on the record before us, we are not prepared to conclude that it was unreasonable for the Government to insist on compliance with the contract's anchor bolt dimension requirements rather than rely on the manufacturer's assessment that something less would be suitable.

DECISION

The appeal is denied.

Dated: 3 May 2001

MARTIN J. HARTY
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. 52327, Appeal of Elter S.A., rendered in conformance with the Board's Charter.

Dated:

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