

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Roy Case Construction Company) ASBCA Nos. 52898, 52899
)
Under Contract No. DACW03-93-C-0048)

APPEARANCES FOR THE APPELLANT: Charles Darwin Davidson, Esq.
Richard Quintus, Esq.
Davidson Law Firm, Ltd.
Little Rock, AR

APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.
Engineer Chief Trial Attorney
Frank Swift, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Little Rock

OPINION BY ADMINISTRATIVE JUDGE PEACOCK

These appeals involve the contractual conditions for fabrication of steel in a facility certified by the American Institute of Steel Construction (AISC). The Government contends that all steel fabrication was required to be performed in an AISC-certified plant. Appellant contends that it reasonably interpreted the contract to mandate that only the linkages were subject to the AISC requirement. Only entitlement is for decision. We deny the appeals.

FINDINGS OF FACT

1. The captioned contract was awarded to Roy Case Construction Company (appellant or RCCC) on 17 June 1993 by the Little Rock, Arkansas District of the United States Army Corps of Engineers (Government or Corps) in the amount of \$1,124,467. The contract provided for fabricating and installing a spillway closure structure consisting in principal part of approximately 180 tons of structural steel as part of a monorail and bulkhead system.

2. The Invitation for Bids (IFB or solicitation) for this project was issued on 1 January 1993. The relevant portion of the specifications central to these appeals involves PART 3 - EXECUTION, SECTION 05561 - BULKHEAD, MONORAIL AND SUPPORTS. As originally issued that section of the solicitation stated in pertinent part:

3.1 FABRICATION

Fabrication requirements shall be as shown on the drawings and specified herein and in Section 05501. METALWORK FABRICATION, MACHINE WORK, AND MISCELLANEOUS PROVISIONS. Components shall be shop-fabricated of the materials shown on the drawings and shall be free of twists, kinks, bends, rough spots, projections, or other deformations. Splices shall occur only where approved by the Contracting Officer. Dimensional tolerances shall be as specified and shown on the drawings. Ultrasonic examination is required on the groove welds around the pipes in the linkages.

3. During the three months after its issuance, the solicitation was amended seven times. Only Amendment 0005, issued on 1 March 1993, is relevant. That amendment modified specification section 05561 by adding a sentence at the end of the paragraph quoted above as follows:

Following ‘linkages.’ insert the following: “The fabricating plant shall be qualified under the AISC quality certification program for Category II structural steel work.”

(Ex. A-461)

4. Appellant interpreted section 05561, as amended, to require that only the linkages (comprising approximately three tons) were to be fabricated in an AISC-certified plant but the vast majority of the steel fabrication work could be accomplished in an uncertified facility (tr. 24-26). The “linkages” hold or link the bulkhead to a monorail beam and are used to level the structure and support the 78-ton bulkhead. The bulkhead was designed to move along the monorail and temporarily fit in each of the dam’s concrete spillways (or tainter gate bays) effectively sealing the spillway to permit maintenance work to be conducted on the dam in the dry. Because RCCC’s facility was not certified, the RCCC bid contemplated that fabrication of the linkages would be subcontracted out to a qualified facility. At the time of bidding, the appellant did not consider that its plant would have to obtain the AISC certification to perform the remaining fabrication work. (Tr. 24-26, 54, 65, 126; ex. A-473)

5. Two potential bidders orally contacted the Government concerning the AISC requirement prior to bid opening. Both bidders construed the solicitation as amended to require all steel to be fabricated in an AISC-certified shop but expressed their concern that the requirement would restrict competition, particularly for small businesses. However, neither prospective bidder protested inclusion of the requirement. (Tr. 170-72, 191-92)

6. Bids were opened on 20 April 1993. RCCC's apparent low bid was 16% below the next lowest bid and 13% below the Government's estimate (tr. 63-64; ex. A-479).

7. On the morning of 18 May 1993, the Corps faxed a letter to the appellant requesting that it verify its bid no later than 25 May 1993. The letter generally advised RCCC that its bid was 13% below the Government estimate and asked RCCC to submit documentation substantiating any alleged mistake in the appellant's bid, including worksheets, a sworn statement as to how any mistake occurred and the actual bid intended. Appellant was also advised of its right to request withdrawal or correction of the bid if a mistake was alleged. (R4, tab 5j at 1)

8. After faxing the verification request to RCCC on the morning of 18 May 1993, Naomi Hayden a Corps contract specialist, made a follow-up telephone call to appellant's President, Mr. Roy Case to insure that he had received the fax. During the conversation, Mr. Case advised Ms. Hayden that RCCC was not an AISC-certified fabricator and had interpreted Amendment 0005 to require that only the linkages were to be fabricated in a certified shop. He indicated that RCCC intended to subcontract fabrication of the linkages. Ms. Hayden maintained that she considered that the AISC requirement applied to all steel fabrication, not just the linkages. Thereafter on the same day, Mr. Case contacted "the only three companies in Arkansas that are certified and they didn't even want to talk to him." On the afternoon of 18 May 1993, Mr. Case visited the Corps offices and spoke with Ms. Hayden and her supervisor, Virginia Moore, the Chief of the Corps' A-E & Construction Branch. During this conversation, Mr. Case admitted that his reading of the specification was a "stupid mistake." To confirm her interpretation, Ms. Hayden phoned Tony Batey, a Corps engineer who had prepared Amendment 0005. Mr. Batey confirmed to Ms. Hayden over the phone that his intent was to require that all structural steel fabrication be performed in an AISC-certified plant. This confirmation was relayed to Mr. Case. Mr. Case was also given the name of a possible subcontractor and a "price sheet for getting his shop certified." He requested that he be given a few days to further consider and investigate the issue. Ms. Moore indicated that the bid verification request afforded RCCC the opportunity to investigate. She explained the mistake in bid process noting in particular that RCCC could request withdrawal or correction of the bid but emphasized that Mr. Case must submit supporting proof of any mistake claimed. (Tr. 29, 33, 82-83, 173-74, 176-81, 205-07, 222; R4, tab 5j at 2)

9. By letter dated 24 May 1993, Mr. Case responded to the Corps' bid verification request, stating that he had not found any computational or mathematical "mistake" in his bid but that he had "misinterpreted" the Amendment 0005 certification requirement to apply only to the linkages. He attributed his "misunderstanding" of the amendment to be an "honest error" on his part. The letter listed types of increased costs that would result from subcontracting all steel fabrication work and indicated that RCCC was in the process of quantifying the extra costs. Mr. Case stated that his "preliminary investigation" indicated that the extra costs "would change my profit structure considerably." He requested that the

Corps “consider reimbursing me” the extra costs once he had completed the process of estimating them. However, Mr. Case did not request correction. Nor did he submit the estimates or other evidence of his intended bid. Mr. Case also did not request withdrawal of his bid indicating instead that he was “very eager and willing to do the job.” (Tr. 43-44; ex. A-462). At the hearing, Mr. Case acknowledged that this letter was not intended to assert a mistake claim and that at no time did he attempt to withdraw his bid or review regulations elaborating on the mistake in bid process (tr. 34, 43-44, 91).

10. The Government made “many attempts” to reach Mr. Case from the time of its receipt of RCCC’s 24 May letter to 8 June 1993. Mr. Case eventually contacted Ms. Moore on 8 June 1993. During the conversation, Mr. Case refused to write any further letters and stated that he wanted “his objection on record that his interpretation” required that only linkages be fabricated in a certified shop. However, Mr. Case expressly stated to Ms. Moore that he recognized that he had been “overruled” and that the Government had not agreed with his interpretation. We find that Ms. Moore made clear to Mr. Case that all steel fabrication was subject to the requirement. (Tr. 39-40, 84-85, 89-90, 94, 99, 103, 106, 108, 186-87, 200, 206; R4 tab 5j at 6)

11. Following her conversation with Mr. Case, Ms. Moore telephoned Bill Smith, the chief of the Corps’ cost engineering section, to assess whether RCCC could perform at the bid price. Mr. Smith informed Ms. Moore that RCCC could successfully perform the contract because the appellant would be performing its own dive work (*i.e.*, less expensively than other bidders who would be subcontracting out that work) and because in Mr. Smith’s opinion the Government estimate was high. (R4, tab j at 5; tr. 207-08) Ms. Moore further concluded that RCCC was responsible and capable of obtaining the AISC certification and fabricating the steel in house or subcontracting that work. She notified the contracting officer of her conclusions by memorandum dated 8 June 1993 (R4, tab j at 7; tr. 210-11).

12. On the same date, the contracting officer sent a letter to appellant asking the contractor to furnish evidence of any claimed mistake in bid no later than 14 June 1993 “or the bid will be considered as submitted” and RCCC would be “required to perform as bid and in accordance with the terms and conditions of the contract.” The letter was intended, *inter alia*, to further apprise appellant of its right to declare a mistake in its bid. (R4, tab 5j at 8; tr. 212-13)

13. The contractor did not respond to this letter and failed to submit any affidavits or documentation evidencing any claimed mistake or estimates of any increased costs associated with obtaining AISC certification. At the hearing, Mr. Case stated that he interpreted the words “as bid” and “as submitted” in the contracting officer’s 8 June letter to mean that the Government was acceding to his view that the certification requirement only applied to the linkages. (Tr. 37, 103).

14. The contract was awarded on 17 June 1993 (ex. A-463). The Notice to Proceed was issued on 6 July 1993 and acknowledged by appellant on 9 July 1993 (ex. A-464).

15. On 20 August 1993, RCCC submitted its application to the AISC to obtain the category II certification along with supporting documentation and advance payment of the fee (R4, tab N at 10). The application stated in part:

I am sending the total amount of fee required for processing my application. I would appreciate your help in moving my application through as soon as possible. We have discussed the fact that I am under contract with the Army Corps of Engineers for a fabrication job that requires category II classification. No work can be done on this project until my shop is approved.

16. Mr. Case considered that obtaining and maintaining the AISC certification would be good for the firm's total business. RCCC has continued to maintain the certification after the warranty period required for this contract expired in 1997. Mr. Case, however, found that fabrication in accordance with AISC requirements often tended to make the appellant not price competitive, particularly as a subcontractor. Overall, Mr. Case's assessment at the trial was that the AISC certification had not provided sufficient return given the invested cost of obtaining and maintaining it. (Tr. 48-49, 109-12)

17. By letter dated 21 September 1993, the contracting officer notified RCCC that the Corps was considering terminating the contract for default for lack of progress. Appellant was advised to correct its failure to perform within ten days (ex. A-464).

18. Mr. Case replied by letter dated 30 September 1993. As relevant to these appeals, Mr. Case reiterated RCCC's interpretation of the AISC issue and requested that the Corps' interpretation "be clarified in writing." Mr. Case indicated that, although appellant had applied for the certification based on oral instructions of the Government, commencement of fabrication activities had to await written confirmation of the Government's interpretation and incurring the costs required to obtain any necessary certification. (Exs. A-465 through -468; tr. 50, 107-11)

19. By letter to appellant dated 28 October 1993, the contracting officer again threatened default termination advising RCCC that its actions taken in response to the "cure notice" were not sufficient. The letter noted in particular that the Government considered that the AISC certification requirement applied to all steel fabrication as the appellant had been apprised prior to award (ex. A-469). As of this date, RCCC had incurred substantial expenses associated with applying for and obtaining the AISC certification (R4, tab N at 89-169).

20. The appellant's attorney replied in a letter dated 3 November 1993. The letter, among other things, requested an equitable adjustment compensating RCCC for the increased costs and time associated with complying with the AISC certification requirement. (Ex. A-470)

21. RCCC obtained the AISC certification effective 24 November 1993 (ex. A-458; tr. 58-59, 107). The contract was substantially completed on 14 November 1994 (Amended Complaint/Answer ¶ 2).

22. On 23 August 1999, RCCC submitted an omnibus claim consisting of numerous subclaims. Subclaims 4 and 5 are relevant to this appeal. Subclaim 4 sought an equitable adjustment in the amount of \$175,641 and a time extension of 161 days allegedly associated with the obtaining and maintaining of the AISC certification and related delays. Subclaim 5 sought recovery of the alleged increased costs (\$204,050) of fabrication in an AISC-certified facility vis-a-vis a non certified shop. (R4, § 1, tab D)

23. The contracting officer denied the claim in its entirety in her final decision dated 6 March 2000 (R4, § 1, tab B). Appellant appealed this denial by letter dated 17 March 2000. The subclaim items were assigned separate docket numbers. All appeals were settled by the parties on 10 April 2001 with the exception of the two instant appeals.

DECISION

RCCC contends that it reasonably interpreted the contract as requiring that only the linkages were to be fabricated in an AISC-certified facility. The appellant also argues that the Government learned of RCCC's interpretation prior to award but improperly made award without written clarification of the Government's allegedly unreasonable interpretation that all steel was required to be fabricated in a certified facility.

The contractor's contention that AISC requirements applied only to the linkages is unreasonable and contrary to its own original interpretation at the time the dispute arose. The term linkages was simply the last word in ¶ 3.1 of the original solicitation. The new sentence added by Amendment 0005 mandating AISC certification was added at the end of the paragraph. The word "linkages" followed by the period ending the original paragraph merely located where the new sentence should be inserted. The requirement was inserted in the broad, general paragraph dealing with the entire steel fabrication process. The paragraph's scope was not confined to linkages. There is nothing in Amendment 0005 that can reasonably be construed as limiting or tying AISC certification to fabrication of only one minor part of the structure.

When first confronted with the issue, Mr. Case conceded that he had misread the amendment requirement making a "stupid mistake." One week later in his only written

preaward communication on the issue, *i.e.*, the 24 May 1993 letter to the Government, Mr. Case did not challenge the Corps' construction. Instead he admitted his "misinterpretation." He further attributed his "misunderstanding" of the specifications to be an "honest error" on his part. His initial, contemporaneous interpretation after bid opening was to acquiesce in the correctness of the Government's interpretation and concede the unreasonableness of his own pre-bid interpretation. In addition, two other potential bidders, while questioning the restrictiveness of the requirement on competition, recognized that the AISC requirement clearly applied to all steel fabrication.

RCCC also argues that if the AISC certification was intended to apply to all steel fabrication, the requirement should have been placed in the first sentence of ¶ 3.1 rather than its last as was the case in a later procurement. Regardless of whether there may have been a preferable place to insert the requirement, we consider that it was nevertheless sufficiently clear, as the appellant initially admitted. In any event, revisions of specification requirements in subsequent procurements do not dictate a conclusion or constitute an admission that the original specifications were ambiguous or excuse an unreasonable interpretation of the previous language. *Martin Lane Co. v. United States*, 193 Ct. Cl. 203, 432 F.2d 1013 (1970).

Moreover, even assuming *arguendo* that the AISC requirement was ambiguous, we consider that any ambiguity was patent. The appellant should have recognized that its interpretation, limiting the AISC certification requirement to fabrication of the linkages, created a patent issue which it was under a duty to resolve prior to bidding. Because it failed to satisfy that duty, it also may not prevail. *Cf. James A. Mann, Inc. v. United States*, 210 Ct. Cl. 104, 535 F.2d 51 (1976); *S.O.G. of Arkansas v. United States*, 212 Ct. Cl. 125, 546 F.2d 367 (1976); *Jamsar, Inc. v. United States*, 194 Ct. Cl. 819, 442 F.2d 930 (1971).

We also do not consider that the post-bid-opening communications between the parties provide grounds for relief. The essential gravamen and the foundation for most of the appellant's contentions in these appeals is that Mr. Case never acquiesced in the Government's interpretation and effectively stood his ground during pre-award discussions with the Corps with respect to the AISC certification requirement. This is simply not correct. It is also disingenuous for Mr. Case to now allege that he interpreted the contracting officer's letter of 8 June 1993 as acceding to RCCC's interpretation. We have carefully considered the sequence of events, actions of the parties, contemporaneously-prepared memoranda and the credibility of the witnesses on this issue. If the appellant believed after the 18 May and 8 June 1993 discussions that the Government might not insist on AISC certification, that belief was purely subjective on Mr. Case's part and was not grounded on any conduct of the Government. To the extent that Mr. Case claims that there was a change in his initial pre-award interpretation as expressed in the 24 May 1993 letter, it was not conveyed to the Government. There was no reasonable basis for the Government to believe that the appellant would not perform in accordance with the interpretation both parties had reached as documented in appellant's own letter.

The appellant relies strongly on *WPC Enterprises, Inc. v. United States*, 163 Ct. Cl. 1, 323 F.2d 874 (1963). That case is not analogous. In *WPC*, each party discovered the other's interpretation of ambiguous specifications prior to bid opening. However, each unreasonably concluded that the other had acquiesced in its interpretation and neither party took proper steps to clarify the pertinent terms. Here, the Government reasonably concluded that the appellant agreed that the contract unambiguously required that all steel fabrication be performed in an AISC-certified facility based on the 18 May and 8 June discussions as well as the 24 May letter. There is no question that the Government unequivocally conveyed to Mr. Case that the AISC certification requirement would be enforced. Moreover, the appellant was instructed concerning the mistake in bid process as a possible avenue for relief but declined to pursue it. *Cf. Robins Maintenance, Inc. v. United States*, 265 F.3d 1254 (Fed. Cir. 2001); *Massman Construction Co. v. United States*, 102 Ct. Cl. 699, 60 F. Supp. 635, *cert. denied*, 325 U.S. 866 (1945); *Central Mechanical, Inc.* ASBCA Nos. 26543 and 26584, 85-1 BCA ¶ 17,711.

In this regard, it bears emphasis that the appellant neither then nor now seeks relief from a mistake in its bid. RCCC does not argue that its 24 May 1993 letter should have been construed and processed by the Government as a mistake claim. Despite being afforded fair opportunity by the Corps' bid verification request and instructions regarding the mistake in bid process, the appellant declined to submit requisite evidence or request correction or withdrawal of its bid. *Cf. Wickham Contracting Co., Inc. v. United States*, 212 Ct. Cl. 318, 546 F.2d 395 (1976). It was fully apprised of its rights by Ms. Moore and Ms. Hayden and was on constructive notice of pertinent regulations.

The appellant maintains that it considered that the interpretation consistently, albeit orally, expressed by Corps representatives was "non binding" unless made in writing. RCCC bases this contention on the solicitation's EXPLANATION TO PROSPECTIVE BIDDERS (APR 1984) clause set forth at FAR 52.214-6. That clause provides in pertinent part that prospective bidders desiring explanations or interpretations of the specifications must request such in writing and "Oral explanations or instructions given before the award of a contract will not be binding." That provision is inapposite. Among other things, it is principally directed to the status of, and reliance on, pre-bid opening statements made orally by Government representatives to prospective bidders that may be construed as altering contract requirements. Here, the interpretations were issued after opening to the prospective awardee enforcing unambiguous contract requirements that were already in writing and conceded by RCCC to exist. We place no credence on the appellant's belated assertion that the Government should have again stated its position in writing. There was no possible confusion as to the Government's position. Although the appellant may have hoped that the Government might reverse itself after RCCC received the award, the contractor accepted the award without protest, condition, reservation of right or claim of mistake. It was the appellant that was uncommunicative. It remained silent, not willing to insist firmly on any interpretation that might threaten award to it of the contract. As

stressed above, the only written communication from Mr. Case to the Government conceded the correctness of the Corps' interpretation and, as such, confirmed the responsiveness of its bid. There was no reasonable reliance by RCCC on the lack of a written expression of the Corps' oft-repeated construction of the certification requirement. In addition, appellant had prepared supporting documentation and submitted its AISC application on 20 August 1993 along with the full application fee. This was more than two months before it received the 28 October 1993 letter that Mr. Case claims confirmed the requirement for the first time in writing.

Nor can we conclude that the Government overreached or unconscionably awarded the contract to the appellant. The Government had no detailed knowledge of the difference in the cost RCCC would incur to obtain the AISC certification and fabricate the steel pursuant to AISC standards. Nor could the Corps evaluate the appellant's subcontracting options or the overall financial efficacy to appellant's entire business that obtaining the AISC certification might engender. Appellant was afforded the time and opportunity to evaluate all potential effects of certification. It was also provided the chance to inform the Government of what its intended bid on this specific contract would have been if the additional costs had been considered, along with a request to correct or withdraw. Appellant decided to forego rights that it knew were available to it. It expressed its eagerness to perform the contract. It now second guesses its decision to accept award without protest as well as its considered business judgment to obtain the certification in the first instance. From the Government's perspective, appellant's 24 May 1993 letter merely implied that the contractor's "profit structure" would be influenced to an indeterminate extent by the AISC requirement. There was no implication that was reasonably discernible from the letter that the appellant would incur substantial losses. The Government also undertook its own investigation of any potential adverse impact on RCCC. On 8 June 1993, Ms. Moore confirmed with the Corps' cost engineering section that appellant could perform at the bid price and received a plausible explanation regarding why the appellant's bid was lower than that of other bidders.

The appeals are denied.

Dated: 3 December 2001

ROBERT T. PEACOCK
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 Nos. 52898, 52899, Appeals of Roy Case Construction Company, rendered in conformance with the Board's Charter.

Dated:

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

