

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Cascade General, Inc.) ASBCA No. 53039
)
Under Contract No. N00024-92-H-8033)

APPEARANCE FOR THE APPELLANT: John T. Jozwick, Esq.
Paradise Valley, AZ

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
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Conversion and Repair
Everett, WA

OPINION BY ADMINISTRATIVE JUDGE FREEMAN
UNDER RULES 11 AND 12.3

Cascade General, Inc. (Cascade) appeals the denial of its claim for providing an environmental protection plan allegedly in excess of specification requirements. Cascade has elected the Rule 12.3 Accelerated Procedure. Both parties have submitted the appeal for decision under Rule 11 without oral hearing. Pursuant to our order of 14 November 2000, we decide entitlement only.

FINDINGS OF FACT

1. On 1 October 1999, the Supervisor of Shipbuilding, Conversion and Repair, USN, Everett, Washington (SUPSHIP) awarded Job Order No. 007M01 to Cascade for specified items of work on the USS FIFE at the Puget Sound Naval Shipyard (PSNS). The work was to begin on 13 October 1999 and be completed by 23 December 1999. (R4, tab 1 at 1, 1A, 2; ex. A-58 at 2)

2. The job order incorporated by reference the DFARS 252.217-7003 CHANGES (DEC 1991) clause, and the terms and conditions of Master Ship Repair Agreement (MSRA) N00024-92-H-8033 (R4, tab 1 at 1A, 23). The MSRA required, among other things, that the contractor comply with the Resource Conservation and Recovery Act (RCRA) and with "all other applicable Federal, State and local laws, codes, ordinances and regulations for the management and disposal of hazardous waste." (R4, tab 2)

3. Paragraph 3.2 of Work Item 077-10-001 required Cascade to remove and handle all hazardous waste identified in Work Item 077-11-001 in accordance with NAVSHIPYARDPUGET Instruction P5100(14)(Rev 2-93), the RCRA, and COMNAVAIRPAC Instruction 5400.1B with Enclosure 4, PSNS Work Practices and Availability Information (R4, tab 8). The PSNS Work Practices document required compliance with NAVSHIPYDPUGETINST P5090.5D “Hazardous Waste Management Plan” and with PSNS instructions for solid waste management, medical waste management, PCB management, oil and hazardous substance (OHS) spills and spill prevention, water pollution prevention and control, and air pollution control (ex. A-3).

4. Paragraph 3.3 of Work Item 007-10-001 required Cascade to have a written procedure, approved by the SUPSHIP, for “Environmental Protection and Hazardous Waste Management” with the following “minimum” requirements:

3.3.1 The names and titles of management personnel in charge of the contractor’s hazardous waste program.

3.3.2 The names and titles of competent persons trained to properly handle hazardous waste.

3.3.3 The contractor’s method of accounting for hazardous waste materials from generation until turned over to Puget Sound Naval Shipyard.

3.3.4 The location of the contractor’s temporary storage sites for hazardous waste materials.

3.3.5 A plan to minimize hazardous waste generation by reducing the volume or toxicity by neutralizing, recycling or otherwise removing it from the requirements of Subtitle “C” of [RCRA]

3.3.6 The contractor’s method for transporting and disposal of waste material.

(R4, tab 8)

5. On 14 October 1999, Cascade had an environmental “kick-off” meeting with Navy representatives (ex. A-98 at 3). At this meeting, Cascade was given a 28-page PSNS “boilerplate” environmental protection plan which included provisions for (i) stormwater pollution prevention management, (ii) wastewater management, (iii) air pollution control, (iv) spill prevention, (v) waste awaiting designation, (vi) salvageable/reusable material and

recyclable waste, (vii) solid waste management, (viii) dangerous waste management, (ix) sewage and odor control, and (x) environmental compliance training (ex. A-17).

6. The scope and detail of the PSNS boilerplate environmental protection plan went significantly beyond the “minimum” requirements specified for the contractor’s plan in paragraph 3.3 of Work Item 077-10-001 (R4, tab 8; exs. A-17, -101 at 3). An introductory note to the boilerplate plan, however, stated:

This Boilerplate Environmental Protection Plan is provided for the contractor’s convenience. The contractor is free to write and submit its own plan to the Contracting Officer. . . .

(Ex. A-17 at 1)

7. Prior to the kick-off meeting, CH2M Hill, an engineering consulting firm, had offered to provide environmental management consulting to Cascade for the FIFE job order at a not-to-exceed price of \$65,000 (exs. A-18, -101, -103). On 14 October 1999, Cascade accepted CH2M Hill’s offer (exs. A-18, -98 at 3).

8. On or about 20 October 1999, Cascade with CH2M Hill’s assistance submitted its initial environmental protection plan. Cascade’s initial plan consisted of 24 pages and covered all of the applicable areas in the PSNS boilerplate plan. (Exs. A-19, -101 at 3) The Navy, however, required two revisions to this initial plan before granting its approval (exs. A-22, -24, -101 at 3). The final revision of the plan (Revision 2) as approved by the Navy on 23 October 1999 consisted of 25 pages of text and 120 pages of appendices from PSNS Instruction P5090.5D, Chapters 1, 2 and 3 (exs. A-24, -101 at 3).

9. On 17 November 1999, Cascade gave written notice to the contracting officer that the requirements and documentation “imposed” on the USS FIFE job order “exceed normal and reasonable environmental controls,” and that it intended to submit a request for a constructive change (R4, tab 14). The contracting officer did not reply to this notice.

10. On 22 December 1999, CH2M Hill requested a \$46,000 increase in the amount of its consulting contract. The request cited an increase in the manhours required to perform the contract, over and above its bid estimate, and stated “if work had been completed as originally scheduled, CH2M HILL would have been under budget.” (Ex. A-31)

11. The job order completion date was extended from 23 December 1999 to 10 January 2000 due to changes in the propulsion shaft prairie air tube repairs and the impact of those changes on scheduled “hot work” in support of other hull, mechanical and electrical work items. This extension of time was proposed by Cascade at no increase in price on 5 January 2000 and accepted by the Navy on 14 January 2000. (R4, tab 15)

12. On 5 January 2000, Cascade submitted a request for equitable adjustment (REA) for \$66,000 for the alleged additional costs of “complying with PSNS environmental control procedures that were not a requirement of the original contract.” The REA alleged that 15 data, reporting, inspection and labeling requirements for hazardous materials brought into the PSNS, and ten sections of the environmental protection plan exceeded specified requirements. The request did not explain how the \$66,000 amount requested was calculated. (R4, tab 18) On 14 April 2000, the contracting officer denied the REA (R4, tab 23).

13. By letter dated 24 April 2000, Cascade submitted the REA as a certified claim with the claimed amount reduced to \$62,996. Cascade explained the claimed amount as being one-half of the total amount invoiced by CH2M Hill plus 20 percent. (R4, tab 24) CH2M Hill’s total billings to Cascade were \$104,994.21 (R4, tab 24 at 4-9). By final decision dated 28 June 2000, the contracting officer denied Cascade’s claim entirely (R4, tab 27). This appeal followed.

DECISION

The scope and detail of the PSNS boilerplate environmental protection plan exceeded the “minimum” specified requirements for that plan. *See* Findings 4 and 6. Moreover, in the course of the approval process the scope and detail of the plan were further expanded to include 120 pages of extracts from the PSNS internal environmental protection instructions. *See* Finding 8. While the boilerplate plan stated on its face that it was not mandatory, and that the contractor could prepare its own plan, it is clear from the Navy’s subsequent refusal to approve Cascade’s initial plan as submitted, and its requirement for additional revisions, that the boilerplate plan as expanded in the revisions was in fact mandatory.

Cascade has proven that it was required to provide an environmental protection plan that exceeded in scope and detail the specified minimum requirements for that plan. Accordingly, it is entitled to a price adjustment under the Changes clause for the difference in cost between producing the plan specified by the contract and producing the plan approved by the Navy. Cascade, however, is not entitled to a price adjustment for the cost of implementing the approved plan. The MSRA and Work Item 077-10-001 required Cascade to handle and dispose of hazardous waste as prescribed in the RCRA, all other applicable Federal, State and local laws, codes, ordinances and regulations, and specified Navy instructions. *See* Findings 2 and 3. There is no evidence that any of the environmental protection actions prescribed in the approved plan exceeded the actions otherwise required of Cascade by the MSRA, Work Item 077-10-001, or the laws, codes, ordinances, regulations and Navy instructions referenced therein.

The appeal is sustained in part on entitlement, and remanded for settlement of quantum in accordance with this decision.

Dated: 4 May 2001

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMLER
Administrative Judge
Acting 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. 53039, Appeal of Cascade General, Inc., rendered in conformance with the Board's Charter.

Dated:

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