

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
The Sherman R. Smoot Corp. ) ASBCA No. 52149  
 )  
Under Contract No. N62477-94-C-0028 )

APPEARANCE FOR THE APPELLANT: Christopher L. Grant, Esq.  
Washington, DC

APPEARANCES FOR THE GOVERNMENT Fred A. Phelps, Esq.  
Navy Chief Trial Attorney  
Richard A. Gallivan, Esq.  
Assistant Director  
Robert C. Ashpole, Esq.  
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES

This appeal arises from the contracting officer's (CO) final decision denying The Sherman R. Smoot Corp.'s (Smoot) claim with respect to toilet and lavatory fixtures. The Board has jurisdiction of this appeal under the Contract Disputes Act of 1978, 41 U.S.C. § 607. After a 10-day hearing, the parties have submitted post-hearing and reply briefs. The Board is to decide entitlement only in this appeal (tr. 12).

Under the captioned contract, the Board consolidated ASBCA Nos. 52145, 52146, 52147, 52148, 52149, 52150, 52173, 52261, 53049, 53115 and 53246. Appellant withdrew ASBCA Nos. 52145, 52146, 52147 and 52148 with prejudice (tr. 37, 80). (See Board's 14 November 2001 Order of Dismissal.) The Rule 4 documents for those four dismissed appeals, however, remain in the record (tr. 11-12). Citations to Rule 4 documents herein identify the appeal in which the document was filed.

FINDINGS OF FACT

1. Solicitation No. N62477-94-R-0028 (the RFP) requested proposals from offerors for a firm fixed-price, "design-build" type of contract to complete the Navy's renovation design, to demolish building 33A and a portion of building 37, to renovate buildings 33, 37, 39, and 109, and to construct a "Link" building at the Washington Navy Yard (WNY) (ASBCA 52173, R4, tab 1, spec. § 01010, ¶ 1.2.1; tr. 791-94).

2. The RFP included Specification No. 21-94-0028, in which § 01010, “SUMMARY OF WORK,” provided in pertinent part:

### 1.3 INTENDED USE OF RFP DOCUMENTS

. . . Throughout the documents various options are presented for each particular system component or aspect of the project. The design criteria and technical specifications provide the requirements for each available option. Where specific requirements are provided for an aspect of the project, they are to be complied with. Where a choice of specific requirements are [sic] provided for an aspect of the project, the Contractor shall select from those specific options . . . . The RFP documents do not represent complete design or construction documentation; they are intended to be the presentation of parameters within which the Contractor shall design, document and construct the project.

. . . .

#### 1.3.2 Drawings

The RFP drawings describe the intended parameters to be used by Contractor to design, document and construct the project. The drawings provide specific requirements to be used in conjunction with the design criteria and technical parameters noted in the specifications . . . . Not all requirements are indicated on the drawings . . . .

. . . .

#### 1.8.2.1 Noncompliance with the RFP documents

If the design submitted by the Contractor does not comply with the RFP requirements, the Contractor shall make such modifications as may be necessary to the documents to bring it into compliance with no change in contract price and schedule . . . .

(ASBCA 52173, R4, tab 1 at 01010-5, -6, -10)

3. The RFP allowed offerors to submit a “Greening Plan” in their technical proposals:

#### A. "Greening" Plan

Your plan to integrate energy efficient and environmentally responsive design into the “basic design” package (i.e., the attached design build RFP drawings and specification divisions 1-16) should be thoroughly delineated in a narrative format. This narrative should include your rationale for providing measures that reduce energy consumption, utilize resources more efficiently, and also improve the livability of the building. **Give specific examples**, such as reduced chiller tonnage. See Attachment I.A.1 that details design opportunities and parameters. [Emphasis in original.]

(ASBCA 52173, R4, tab 1 at 00160-3, attach. I.A.1; tr. 805-06)

4. Attachment I.A.1 in the RFP provided in pertinent part:

**"GREENING" PLAN - OPPORTUNITIES AND PARAMETERS**

**1. DEFINITIONS**

**"Basic Design" Package:**

The design build RFP drawings and specifications for this project.

**Opportunities:**

Possible "greening" changes to the "basic design" package. Various opportunities are indicated below by a "+". They are not intended to be a complete listing. The intent of these changes shall be to improve energy efficiency, environmental responsiveness, and the livability of the project buildings. Opportunities are sometimes followed by constraints, which are indicated by a "-". [Emphasis in original.]

(ASBCA 52173, R4, tab 1 at attach. I.A.1).

5. Specification No. 21-94-0028, ¶ D2010, “PLUMBING FIXTURES,” of § 01220, “BUILDING DESIGN AND CONSTRUCTION REQUIREMENTS,” specified water closet (WC), urinal, and lavatory fixtures “as indicated” (ASBCA 52173, R4, tab 1 at 01220-54, -55). RFP drawings A2.1.1 through A2.4.2 depicted 57 WCs, 18 urinals, and 53 lavatories, totaling 128 fixtures (ex. A-2 at S000894-S000904).

6. The Navy received Smoot’s 17 January 1996 proposal on the RFP (ex. A-88 at S008363).

7. The CO's 8 February 1996 letter to Smoot stated:

The government is seeking ways to maximize the "greening" components of your proposal. Accordingly, please review the specifications and design to determine areas which may place artificial constraints; nonvalue added post award construction requirements; and any other changes which may add cost but not contribute to a quality construction project. Substitution of mandated materials may be considered.

. . . your response should specify division and paragraph number of the specification, related drawing numbers, short description of the change, and any related impact on the project. **Your cost savings ideas may be incorporated, by amendment, into the solicitation and given to all offerors in the competitive range**

. . . . Please submit your recommended amendments to the solicitation by 2:00 p.m. on 15 February 1996. [Emphasis in original.]

(Ex. G-73)

8. Smoot's 15 February 1996 list of "recommended amendments," submitted in response to the CO's 8 February 1996 letter, stated "Reduce the toilet fixture count" with impact "None," under specification § 01220, ¶ D2010 (ex. G-74 at 1, 4).

9. On 16 February 1996, the Navy asked Smoot to respond to "written discussion questions," including No. 8: "What items listed in your Greening Plan are included in your proposal?" (ASBCA 52149, R4, tab 8 at 2; ex. G-77 at SC-006270, -6325).

10. The CO's 23 February 1996 letter to Smoot said that the CO had evaluated Smoot's cost savings ideas and recommendations and that the Navy would issue a technical amendment to the RFP on 26 February 1996 which would adopt some but not all of Smoot's ideas and suggestions (ex. G-75).

11. The CO's 26 February 1996 letter to Smoot sent Amendment 0004 with technical changes to the RFP, and stated, "any revisions to your proposal in response to our discussions of 16 February 1996 and the Amendment herein will be considered provided it is received" by 4 March 1996. Amendment 0004 did not address or change specification § 01220, ¶ D2010. (Ex. G-76)

12. Smoot's 4 March 1996 reply to the CO's 16 February 1996 written discussion Q.8 stated under "Division 15 - Plumbing": "? Provide water closet and lavatory fixtures based on building occupancy. ? Reduce demand for potable hot and cold water" (ex. A-88 at S008513).

13. On 22 March 1996, the CO requested Smoot to submit its best and final offer on the RFP not later than 27 March 1996 (ex. A-1 at S000050). Smoot's 27 March 1996 best and final offer included 55 WCs, 18 urinals, and 51 lavatories, totaling 124 fixtures (ex. A-1 at S000232, S000267).

14. On 3 May 1996, the Navy awarded Smoot Contract No. N62477-94-C-0028 (contract 28) based upon the RFP (ASBCA 52173, R4, tab 1 at 2). Block 21 of the Standard Form 1442 for contract 28, under "AWARD," stated: "Technical proposals, inclusive of all revisions through Best And Final Offer dated 27 March 1996." Contract 28 incorporated by reference the standard fixed-price construction contract terms and conditions, including the FAR 52.243-4 CHANGES (AUG 1987) clause (ASBCA 52173, R4, tab 1 at 00721-12).

15. On 1 August 1996, Smoot's architects calculated that the water closet, urinal and lavatory fixture count would be reduced by 62 to comply with the National Standard Plumbing Code, 1993 Edition (ASBCA 52149, R4, tab 2 at 14; tr. 884-85).

16. On 5 August 1996, Smoot sent Request for Information No. 017 (RFI-17) to the Navy, stating:

The response to the RFP and the "Greening Plan" resulted in our proposing to provide water closet and lavatory plumbing fixtures based on building occupancy and reducing the demand for potable hot and cold water. Based on the fixture requirements per the National Standard Plumbing Code of 1993, the required number of plumbing fixtures per that code computes to a total number of fixtures that is sixty-two (62) less than the number of fixtures shown on the RFP drawings.

The Navy has verbally stated that it desires fixture quantities as shown in difference to SRS's proposal. It is requested that the Navy provide contracting officer's direction for this change.

(ASBCA 52149, R4, tab 3 at 2)

17. On 6 August 1996, LCDR Andrew Trotta, the Resident Officer in Charge of Construction (ROICC), replied to RFI-17: "PLEASE PROVIDE THE PLUMBING FIXTURE QUANTITIES AS SHOWN ON THE PLANS AND SPECIFICATIONS" (ASBCA 52149, R4, tab 3 at 2). The record does not show whether LCDR Trotta was a CO.

18. Smoot's 10 September 1996 letter to the CO reserved its rights to additional costs to provide the number of plumbing fixtures shown on the RFP as directed in RFI-17, rather than the quantity in Smoot's "Greening Plan" (ASBCA 52149, R4, tab 4).

19. The CO's 22 January 1997 letter to Smoot stated that the number of plumbing fixtures shown on the contract drawings is part of the original contract, and that in accordance with the contract "the Government desires and has therefore specified more toilet facilities" than a lesser number required to comply with the plumbing code (ASBCA 52149, R4, tab 6). We find that the CO knew of, and concurred in, the ROICC's 6 August 1996 response to Smoot's RFI-17.

20. Smoot's 6 July 1998, contract 28, as-built drawings Nos. A2.1.1 through A2.4.2 depict 57 water closets, 18 urinals and 50 lavatories, totaling 125 fixtures (ex. A-89 at S008878-S008898 ).

21. On 28 August 1998, Smoot submitted to the CO a certified claim in the amount of \$140,085.00 for "Greening Plan Plumbing Fixture Quantities," referencing RFI-17 (ASBCA 52149, R4, tab 8).

22. On 22 January 1999, the CO denied Smoot's 28 August 1998 claim in its entirety (ASBCA 52149, R4, tab 9), which decision Smoot timely appealed to this Board on 19 April 1999.

#### POSITIONS OF THE PARTIES

Smoot argues that its 27 March 1996 best and final offer stating the quantities of plumbing fixtures it proposed to install in the renovated WNY buildings was incorporated in contract 28; the Navy required Smoot to install 62 more plumbing fixtures than were proposed in Smoot's best and final offer; and, therefore, such Navy direction was a constructive change order.

Respondent argues that its enforcement of the contract drawing requirements depicting the number of plumbing fixtures for the renovated WNY buildings was not a change; contract 28 required Smoot to comply with the specific requirements of the specifications and drawings; the Navy's interpretation of Smoot's "greening plan" was reasonable; Smoot was aware of the Navy's reasonable interpretation of such greening plan before award of contract 28 and did not protest such Government interpretation; and Smoot's interpretation of a "vague general statement in its proposal" – "provide water closet and lavatory fixtures based on building occupancy" and "reduce demand for potable hot and cold water" – was unreasonable and violated the basic rules of contract interpretation.

#### DECISION

To recover for a constructive change, a contractor must prove that: (1) the CO compelled the contractor to perform work not required under the terms of the contract; (2) the person directing the change had contractual authority unilaterally to alter the contractor's duties under the contract; (3) the contractor's performance requirements were enlarged; and (4) the added work was not volunteered, but resulted from the direction of the Government's officer. *See Len Company and Associates v. United States*, 385 F.2d 438, 443, 181 Ct. Cl. 29, 38 (1967).

Smoot did not volunteer to install the plumbing fixture quantities shown on the contract drawings (finding 18). The CO concurred in the ROICC's 6 August 1996 direction to Smoot to provide such quantities (finding 19). Thus, constructive change elements (2) and (4) were proven. The parties dispute whether elements (1) and (3) were proven.

Respondent points to its 8 February 1996 letter to Smoot, which requested cost saving ideas which might be incorporated by amending the RFP (finding 7), the CO's 23 February 1996 letter to Smoot stating that the 26 February 1996 RFP amendment would adopt some but not all of Smoot's cost saving ideas and suggestions (finding 10), and the RFP Amendment 0004 of 26 February 1996 that did not change specification § 01220, ¶ D2010 (finding 11), which specified plumbing fixtures "as indicated" (finding 5) and the RFP drawings which indicated 57 WCs, 18 urinals, and 53 lavatories (finding 5). Respondent concludes that on 6 August 1996 it only directed Smoot to provide the quantities prescribed by contract 28.

Respondent ignores the facts that on 26 February 1996 the CO requested Smoot to submit proposal revisions by 4 March 1996 in response to the parties' 16 February 1996 discussions and RFP Amendment 0004 (finding 11); on 4 March 1996 Smoot submitted a "Division 15 - Plumbing" proposal revision stating "Provide water closet and lavatory fixtures based on building occupancy. . . . Reduce demand for potable hot and cold water" (finding 12); Smoot's 27 March 1996 best and final offer (BAFO) proposed 55 WCs, 18 urinals, and 51 lavatories, totaling 124 fixtures (finding 13); and contract 28 expressly stated that it included Smoot's "Best And Final Offer dated 27 March 1996" (finding 14). Plumbing fixture quantities in the RFP, in Smoot's BAFO, and shown in Smoot's as-built drawings under contract 28, are tabulated as follows:

<u>Source</u>	<u>WCs</u>	<u>Urinals</u>	<u>Lavatories</u>	<u>Totals</u>	<u>Finding</u>
RFP	57	18	53	128	5
BAFO	55	18	51	124	13
As-built	57	18	50	125	20

Respondent's arguments about its reasonable, and Smoot's unreasonable, interpretation of Smoot's greening plan presuppose that the terms of contract 28 with respect to "greening" plans and incorporation of Smoot's BAFO in the contract were vague and ambiguous. We find no ambiguity in such terms, which were incorporated into contract 28. *See Cessna Aircraft*

Co., ASBCA No. 37726, 95-1 BCA ¶ 27,373 at 136,426-27 (Government was bound by the terms of the offer it chose to accept, so order to increase performance over that offered was a compensable change).

Smoot contends that it installed 62 more plumbing fixtures than it had proposed in its BAFO. The record does not support such contention. Our findings show that Smoot installed two more WCs, the exact same number of urinals, and one fewer lavatory, than its BAFO had proposed.

We sustain the appeal. Appellant is entitled to its net additional costs, if any, for supplying two more WCs and one less lavatory than the contract required. The balance of the appeal is denied. The matter is returned to the parties for negotiation of quantum in accordance with this decision.

Dated: 4 November 2002

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DAVID W. JAMES, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signatures continued)

I concur

I concur

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

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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. 52149, Appeal of The Sherman R. Smoot Corp., rendered in conformance with the Board's Charter.

Dated:

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