

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
The Sherman R. Smoot Corp.) ASBCA No. 52150
)
Under Contract No. N62477-94-C-0028)

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

Charles M. Asmar, Esq.
Jeremiah S. Regan, Esq.
McManus, Schor, Asmar
& Darden, LLP
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 regarding aluminum-housed lighting fixtures for open office areas. 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 (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 specification, § 01220, ¶¶ D.5020.10.a 1 and D5020.20.b.4, required “Type A1” lighting fixtures meeting Illuminating Engineering Society RP-1 guidelines and producing 50 fc (foot-candle) illumination, for open office areas. RFP drawing E6.1 depicted the “Type A1 Fixture” as recessed mounted, two by four foot, with “housing formed of die-formed, cold rolled steel.” The RFP specified no brand or trade name, make or catalog number for the Type A1 fixture. (ASBCA 52173, R4, tab 1 at 01220-96, -99; ex. A-2 at S001036-37; tr. 821-25, 1398)

3. Section 00160 of the RFP allowed offerors to submit a “Greening Plan” in their technical proposals, stating:

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 See Attachment I.A.1 that details design opportunities and parameters.

(ASBCA 52173, R4, tab 1 at 00160-3; 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 at 1)

5. Among the “greening” opportunities indicated in Attachment I.A.1 were “indirect lighting” in all first through third floor office areas, and ambient lighting levels reduced from 50 to 30 fc, with the constraint that a “pendant-mounted [suspended] light fixture . . . shall be used” (ASBCA 52173, R4, tab 1 at attach. I.A.1 at 1-3; tr. 805-06).

6. The RFP incorporated by reference the FAR 52.236-5 MATERIAL AND WORKMANSHIP (APR 1984) clause, which provided in pertinent part:

(a) . . . References in the specifications to equipment, material, articles or patented processes by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition. The Contractor may, at its option, use any equipment, material, article, or process that, in the judgment of the [CO], is equal to that named in the specifications, unless otherwise specifically provided in this contract.

and the 52.243-4 CHANGES (AUG 1987) clause (ASBCA 52173, R4, tab 1 at 00721-12).

7. Smoot’s 17 January 1996 initial proposal on the RFP included a “Greening Plan” that proposed under “Metals (CSI Division 5) . . . Use steel rather than aluminum where possible (less embodied energy),” and under “Lighting (CSI Division 16) . . . Task/ambient lighting system for office areas (30 fc provided by pendant direct/indirect fixtures as per RFP Attachment I.A.1)” (ex. A-88 at S008363, S008610, S008616).

8. The CO’s 26 February 1996 letter to Smoot stated, “any revisions to your proposal in response to our discussions of 16 February 1996 . . . will be considered provided it [sic] is received” by 4 March 1996 (ex. G-76).

9. In reply to the CO’s Question 6, “Submit light fixture cuts with backup engineering data,” on 4 March 1996, Smoot sent the CO a catalog cut of the Linear Lighting Corp. “SlimLite 39,” suspension-mounted fixture with “T8” ballast and “extruded aluminum” sides for “office lighting” (ex. G-77 at SC006270, -6304, -6311 to -6313; tr. 805-06, 826-31, 835-36). Smoot’s submission did not state that the SlimLite 39 fixture

was “representative” of the pendant lighting fixtures Smoot proposed to furnish, identify any of its salient characteristics, or state that aluminum housing was not salient.

10. Smoot’s 27 March 1996 best and final offer (BAFO) on contract 28 contained a “Project Estimate” with itemized prices under 16 divisions (ex. A-1 at S000117). Smoot’s “Division 5 Metals” prices included no lighting fixture housings (ex. A-1 at S000076-77, S000299). Smoot’s “Division 16 Electrical” estimate included no Type A1 recessed fixtures (ex. A-1 at S000280). Attached to the Division 16 estimate were: (a) Mona Electric Construction, Inc.’s (Mona) 27 March 1996, unpriced proposal to Smoot for the WNY RFP “Lighting . . . per D5020”; (b) Smoot’s “Telephone Bid” dated “3/27” from Mona, on which Smoot wrote, “Price goes up to ‘green’ ? of 900 2x4 to 1200 one bulb T-8 pendant 80,000”; (c) Smoot’s “Contractor Comparison Sheet” showing Mona’s \$1,890,000 bid marked “OKAY”, to which was added “GREENING 80,000” and a \$1,970,000 total; and (d) Smoot’s “Quantity Survey” showing 1,230 pendant fixtures added for open office areas (ex. A-1 at S00847-50, -792, -814 to -17).

11. 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.” We find that the price of contract 28 included the cost of the Linear SlimLite 39 pendant lighting fixtures in Smoot’s BAFO.

12. On 30 May 1996 Mona received and reviewed Smoot’s 17 January 1996 “Greening Plan” proposed on the RFP (ex. A-222 at 1, 4, 6; tr. 1252-53, 1397-1400). Mona told Smoot that there would be a “premium” to provide the Linear aluminum pendant fixture Smoot had proposed (tr. 1400-04). Mona was willing to furnish a steel, pendant fixture at no increased subcontract price (tr. 1272, 1407).

13. Smoot’s 35% WNY renovation design included a 7 August 1996 “FIXTURE SCHEDULE” prepared by Mona listing, for the Types A1 and A15 fixtures, a “Neoray 92DIP,” pendant mounted, steel fixture (exs. A-221, -235, -237; tr. 1409).

14. The Navy project engineer’s 7 September 1996 comments on Smoot’s 35% design stated that cold rolled steel fixtures for direct-indirect lighting in open office areas were “inferior in quality and look” to the extruded aluminum fixtures in Smoot’s “Revised Greening Proposal”; thus, his “recommendation/decision” was to enforce the provision of aluminum lighting fixtures (ex. A-242 at 4, 14; tr. 832-35, 878-80, 1411).

15. Smoot’s 11 September 1996 letter to the CO stated that Smoot would provide aluminum pendant lighting fixtures pursuant to the Navy’s 7 September 1996 letter, but Smoot considered such decision to be a change order (ASBCA 51250, R4, tab 2 at 4).

16. Smoot and Mona tried to mitigate the fixture costs by offering an equivalent, aluminum, pendant fixture, Illumination Concepts' SLX fixture, but it did not meet the RFP's 30 fc (for "greening" pendant light fixtures) and 1.2 watt/square foot usage requirements (exs. A-252, -55, -56).

17. On 27 March 1997 Smoot subcontracted with Mona for the electrical work under prime contract 28. Subcontract Article 28 required prime-subcontractor disputes not involving "the Prime Contract or Owner's conduct thereunder" to be decided in a state court of competent jurisdiction. (Ex. A-218 at 6, 18, 21, 27-28)

18. On 7 July 1997 Mona submitted to Smoot a "Change Proposal" regarding the use of aluminum pendant fixtures, designated "SRS PCO #31," in the amount of \$90,480 (ASBCA 52150, R4, tab 6).

19. Since Linear's "SlimLite 39" was out of production, Mona furnished and the Navy accepted under the WNY subcontract as "Type A1" lighting, 4,824 feet of Linear "SlimLite S310" pendant, extruded aluminum, direct/indirect fixtures (ex. A-262 at 2, 5; tr. 1416-18).

20. Smoot's 15 July 1997 letter to the CO, "SUBJ: PCO #31 (Indirect/Direct Lighting Open Offices)," requested a \$102,846 increase, broken down into \$445.89 for Smoot's direct materials, labor and other costs; \$90,480 for Mona's costs proposed on 7 July 1997; and \$11,920.46 for Smoot's overhead on Mona's costs, home office overhead, profit and bond premium, totaling \$102,846.35 (ASBCA 52150, R4, tab 7).

21. The CO's 10 December 1997 letter to Smoot denied the 15 July 1997 PCO # 31 request for equitable adjustment (ASBCA 52150, R4, tab 9).

22. On 28 August 1998 Smoot submitted to the CO a certified claim in the amount of \$102,846 for "PCO #31 (Lighting Fixtures)" (ASBCA 52150, R4, tab 10).

23. The CO's 11 February 1999 final decision denied Smoot's 28 August 1998 claim in its entirety (ASBCA 52150, R4, tab 11), which decision Smoot timely appealed to this Board on 19 April 1999.

POSITIONS OF THE PARTIES

Smoot argues that the catalog cut of the Linear "SlimLite 39" aluminum, pendant fixture it sent to the Navy was "representative" of the pendant fixture for open office areas of the WNY buildings under Division 16, which it proposed together with use of steel rather than aluminum where possible, under Division 5; Smoot had the right to furnish an "equal" steel-housed pendant fixture; the Navy required Smoot to install Linear aluminum-housed lighting fixtures; and such Navy direction was a contract change.

Respondent argues that the Navy's direction to provide aluminum pendant fixtures did not change or enlarge the requirements of contract 28, since the SlimLite 39 fixture was in Smoot's proposal, was accepted by the Navy, and hence was part of contract 28; Smoot's Division 5 greening proposal to use steel rather than aluminum did not take precedence over its Division 16 proposal to use an aluminum fixture; and whatever redress Mona may have against Smoot must be determined in another tribunal.

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).

The parties dispute principally whether the Navy's direction to furnish aluminum lighting fixtures was a contract change. Appellant argues that its 4 March 1996 catalog cut of the Linear "SlimLite 39" aluminum fixture was only "representative" of the pendant fixture it proposed to install in open office spaces in the renovated WNY buildings. The record and the applicable legal precedents, however, do not support Smoot's argument. Smoot's 4 March 1996 response to the CO regarding "office lighting" fixtures did not state that the "SlimLite 39" fixture was "representative" of the pendant fixture Smoot intended to furnish (finding 9). Moreover, a party's unexpressed subjective intent is not enforceable. *See Bath Iron Works Corp.*, ASBCA No. 43303, 94-3 BCA ¶ 27,033 at 134,734 (a party's uncommunicated, subjective intent not enforceable).

Smoot further argues that it was entitled to furnish the less costly Neoray steel-housed fixture, pursuant to the Material and Workmanship clause in contract 28, since the more costly Linear "SlimLite 39" catalog cut was a "specification" and the "Neoray 92DIP" steel fixture was "equal" to the "SlimLite 39" aluminum fixture (findings 6, 13).

Appellant cites, and our independent research has uncovered, no legal authority directly on point for the proposition that when an offeror designates a brand name product and its offer is incorporated in a Government contract having the FAR 52.236-5 MATERIAL AND WORKMANSHIP clause, the contractor is entitled to use a substitute product of the same standard of quality in accordance with ¶ (a) of that clause.

Our research uncovered two cases in which the contractor designated the brand name product: *Consolidated Diesel Electric Co. v. United States*, 533 F.2d 556, 209 Ct. Cl. 521 (1976) (applied the rationale of *Jack Stone Co. v. United States*, 344 F.2d 370, 374, 170

Ct. Cl. 281, 287 (1965), and held that the contractor was entitled to recover for a constructive change when, in a two-step formally advertised procurement, the Government approved four diesel engine combinations in the offeror's technical proposal, which offer was expressly incorporated in the contract resulting from the second step, and after award the CO required the contractor to deliver the first engine combination); *ITT Federal Electric Corp.*, ASBCA No. 20436, 77-2 BCA ¶ 12,790 (Board applied the *Jack Stone* rationale to a fixed price incentive contract that provided for incentive cost and profit sharing, including substitution of a less costly product). Neither precedent is directly applicable to this dispute under contract 28, which was not a two-step procurement in which the Navy approved multiple lighting fixtures offered by Smoot, nor a contract envisioning incentive cost and profit sharing. We need not decide this issue of first impression, on account of our resolution below.

Assuming, *arguendo*, that the substitute product provision applies to a brand name product specified by an offeror or contractor, the specification is required to identify its "salient characteristics" so as to allow the CO to determine whether a substitute product, proposed pursuant to ¶ (a) of the FAR 52.236-5 MATERIAL AND WORKMANSHIP clause, is of the same "standard of quality" as the brand name product. See *Blount Bros. Corp.*, ASBCA No. 31202, 88-3 BCA ¶ 20,878 at 105,574-75.

Smoot did not expressly identify any "salient characteristics" of the Linear "SlimLite 39" lighting fixture (finding 9). When the salient characteristics of the brand name product are not expressly identified, one may infer the self-evidently salient characteristics of a product from its purpose and features. See *Overstreet Electric Co., Inc.*, ASBCA No. 52401, 00-2 BCA ¶ 30,981 at 152,910, *aff'd*, 20 Fed. Appx. 878 (Fed. Cir. 2001) (table). The major difference between the Linear SlimLite 39 product that Smoot proposed in March 1996, and the Neoray 92DIP product Smoot submitted after award in August 1996, was their respective aluminum and steel housings. Smoot's catalog cut on the Linear SlimLite 39 product did not advise the CO that the type of metal was not a salient characteristic. (Findings 9, 13) Thus, it is reasonable to infer that aluminum housing was a salient characteristic of the standard of quality of the Linear SlimLite 39 fixture. The Navy so viewed the aluminum fixture (finding 14). We hold that the CO's rejection of the steel Neoray fixture, and his acceptance of the aluminum Linear SlimLite S310 fixture (finding 19), were not abuses of discretion within the *Jack Stone* rationale.

We hold that Smoot is not entitled to recover any additional compensation for providing aluminum lighting fixtures under contract 28.

We deny the appeal.

Dated: 18 November 2002

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

Dated:

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