

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Lamb Engineering & Construction Co.) ASBCA No. 53360
)
Under Contract No. DAHA02-98-C-0001)

APPEARANCES FOR THE APPELLANT: Robert G. Watt, Esq.
Keith C. Phillips, Esq.
Watt, Tieder, Hoffar & Fitzgerald, L.L.P.
McLean, VA

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
Craig S. Clarke, Esq.
Deputy Chief Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE COLDREN ON THE GOVERNMENT'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

The Government has moved for partial summary judgment on the narrow issue of appellant's claim for damages associated with the Government's delay in awarding the captioned contract.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. The underlying Invitation for Bids (IFB) specified a bid opening date of 30 December 1997 and a performance period of 630 days after receiving award of the contract. The IFB also stated that "[o]ffers providing less than 60 calendar days for Government acceptance after the date offers are due will not be considered and will be rejected." (R4, tab 1 at Bates No. 00001)

2. Seven phases of work were delineated in the IFB, *i.e.*, phases I through VII. Each phase was assigned a "Milestone," or a date of completion. In addition to milestones for each phase, the initial IFB included a milestone of 9 January 1998 for contract award along with other milestones with contract completion being 630 days later on 1 October 1999. Phase VII had the same milestone date as contract completion. (App. opp'n, tab A)

3. While a cover letter, dated 27 January 1997 [sic], accompanying Revision 1 to the IFB indicated that the 6 February 1998 bid opening date remained "unchanged," the performance period of 630 days was not affected. The record does not indicate when the bid opening date was changed to 6 February 1998. (R4, tab 1 at Bates Nos. 00018, 00001,

00002) This revision to the IFB also moved the contract award milestone to 20 February 1998. None of the other milestones were changed with contract completion as well as Phase VII remaining 1 October 1999. Thus, the amendment of only the contract award milestone without amending the other milestones erroneously made the contract performance period 588 days rather than the 630 indicated on the front page of the IFB and reduced the performance period for all of the phases (R4, tab 2 at Bates No. 40).

4. Appellant submitted its bid on 6 February 1998 (R4, tab 1 at Bates No. 00002).

5. Bids were opened on 6 February 1998 (Gov't Motion for Summary Judgment (MSJ), tabs 3, 4). Appellant's bid was low at \$7,469,972. The second lowest bid was \$8,699,500. (MSJ, tab 2) The Government estimate was \$10,234,000 (MSJ, tab 3, ¶ 4f).

6. By a letter dated 10 February 1998, the Government requested that appellant both verify its bid and obtain references from its bank and owners from four prior projects so that a responsibility determination could be made (MSJ, tab 4). Appellant responded to the request for responsibility information by a letter dated 12 February 1998 providing a list of prior projects, a letter from the firm providing its performance and payment bonds, a letter from its bank, and its recent financial statements (MSJ, tab 5).

7. By a letter dated 17 February 1998, appellant verified its bid and stated that its bid included the wages required by the U.S. Department of Labor Wage Decisions (MSJ, tab 7). The Government responded in a letter dated 18 February 1998 requesting that appellant submit a schedule of values so that its evaluation of appellant's responsibility could be completed (MSJ, tab 8). Appellant in a letter dated 23 February 1998 submitted the schedule of values requested by the Government (MSJ, tab 9).

8. On 10 March 1998, the contracting officer issued a determination that appellant's bid price was reasonable (MSJ, tab 12). On that same date, the contracting officer determined that appellant was a responsible bidder (MSJ, tab 13). This determination included detailed written descriptions of interviews with appellant's four references for four prior major projects (*id.*).

9. The Government awarded the contract on 16 March 1998, 38 days after appellant submitted its bid, but after the amended IFB contract award milestone of 20 February 1998 (R4, tab 1 at Bates No. 00002; finding 3). Appellant did not reject that award, but accepted the contract and performed.

10. On 2 April 1998, the Government issued an unilateral Contract Modification No. P00001, "which provide[d] for the revisions to the milestone dates effected [sic] by the March 16, 1998, contract award." Although the contract was awarded 24 days after the amended IFB contract award milestone date of 20 February 1998, this modification extended the milestones for Phases I through Phase V by 25 days. It failed to alter the

milestones for Phases VI and VII even though contract work appears to end with the completion of Phase VII. It amended the contract completion date to 6 December 1999 which was 630 days after the amended contract award milestone. (R4, tab 195 at Bates No. 2052)

11. By letter dated 22 September 2000, appellant submitted a request for equitable adjustment (REA). Under “Schedule Delays,” appellant asserted that the “project was delayed a month.” The basis of the assertion being the difference between the original contract award milestone of 20 February 1998 and the actual date of award, 16 March 1998.¹ Appellant re-asserts essentially the same delay claim under “Extended Overhead Costs.” The basis of the claim is that appellant was deprived of the ability to work in the one month of good weather in spring and instead forced to work that lost month in the bad weather of winter, thereby increasing its costs of performance. (R4, tab 456 at Bates Nos. 3358, 3377; finding 3)

12. In its Complaint filed with this Board in these appeals, appellant does not specifically identify a claim for delay in the contract award as enumerated in its REA described in finding 11. It admits that this claim is included in its omnibus claim for damages for Government caused delay and acceleration in the construction of the project under the contract in ASBCA No. 53360 (app. opp’n at 11).

DISCUSSION

Summary judgment is appropriate where no material facts are genuinely in dispute, and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387 (Fed. Cir. 1987). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Government advances two bases for its argument that appellant is not entitled to any delay damages attributable to the later contract award date.² First, the Government maintains that “the milestones were only pre-award estimates.” (MSJ, 7-9) Second, any delay in awarding the contract was “reasonable” (MSJ, 10-12).

Appellant strenuously disagrees with both bases. Appellant insists that the milestones were not estimates, and the Government’s actions clearly demonstrate such. (App. opp’n at 6-7) Appellant takes exception also to any characterization of the slippage

¹ The REA stated an award date of 20 March 1998; it is unclear from the record what basis appellant used to determine that date.

² The Government originally asserted a third basis; however, it has since withdrawn that basis (Gov’t reply at 1).

of the award date as “reasonable,” claiming that this matter is a factual dispute (*id.* at 9-10). Finally, appellant urges that we deny the motion as “procedurally defective in that it seeks adjudication of a non-dispositive issue, not a claim” (*id.* at 11).

We turn first to appellant’s argument that partial summary judgment is inappropriate because only a portion of its omnibus claim is involved. Appellant’s REA clearly included a claim for increased costs of performance based upon the action of the contracting officer in awarding the contract after the contract award milestone date included in the amended IFB (finding 11). It is true that appellant did not make this a separate claim in its Complaint, but instead included it as a part of its omnibus delay claim (finding 12). However, this contract award delay claim is based upon separate contracting officer action and clearly is a separate cause of action. It is a matter over which we can and will exercise our summary judgment authority.

We turn now to the merits. None of the arguments or counter-arguments has addressed several fundamental facts which are not disputed. The amended IFB had a bid opening date of 6 February 1998 (finding 3). It included a contract milestone for contract award of 20 February 1998 (*id.*). It also contained a promise that the Government had 60 days from the date offers were due to make an award by accepting the bid (finding 1).

Appellant submitted its bid on 6 February 1998 (finding 4). Bids were opened in accordance with the amended IFB on that date with appellant being the low bidder (finding 5). Contract award was not made by the contract award milestone of 20 February 1998 contained in the amended IFB (findings 3, 9). It was made 24 days later on 16 March 1998 (*id.*).

Appellant argues that the Government caused it delay damages by not making that award by the contract award milestone date of 20 February 1983. However, the IFB authorized the Government to take 60 days from 6 February 1998 which was the date offers were due. This 60 day minimum bid acceptance period is “a material requirement with which the bid must strictly comply at bid opening in order to be considered responsive.” *The Ramirez Co. and Zeon Construction Corp.*, Comp. Gen. B-23320, 27 January 1989, 89-1 CPD ¶ 91. Neither party takes the position that the 60 day minimum acceptance period was reduced to the earlier contract award milestone of 20 February 1998. Thus, we hold that appellant assumed the risk for any cost increase relating solely to the timing of the award because that award was made within the 60 day minimum bid period agreed to by the parties.

DECISION

The Government’s motion for partial summary judgment regarding appellant’s claim for delayed contract award is granted because the award was made within the 60 day bid acceptance period agreed to by the parties. Any other dispute concerning the milestones

and the manner in which the Government adjusted them in Modification No. P00001 is reserved until after further proceedings.

Dated: 17 September 2002

JOHN I. COLDREN, III
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEPLER
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. 53360, Appeal of Lamb Engineering & Construction Co., rendered in conformance with the Board's Charter.

Dated:

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