

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
M&W Construction Corporation) ASBCA No. 53481
)
Under Contract No. N62470-99-C-3619)

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OPINION BY ADMINISTRATIVE JUDGE STEMLER

This appeal involves a contract for repairs at a Marine Corps air station. M&W Construction Corporation has filed both a motion for partial summary judgment and a motion to compel.

FINDINGS OF FACT FOR PURPOSES OF THE MOTIONS

1. The Government awarded Contract No. N62470-99-C-3619 to M&W Construction Corporation (M&W or appellant) on 1 December 1999. Under the contract, M&W was to repair the Central Heating Plant at the Marine Corps Air Station, Cherry Point, North Carolina. (Complaint and answer, ¶ 4)

2. At Clause I.44, the contract incorporated by reference Federal Acquisition Regulation clause 52.243-4 CHANGES (AUG 1987) (R4, tab 1, Doc. 00721 at 17).

3. The total contract price was \$817,510, which included Bid Items 1, 2, 3 and Additive Bid Item 1 (complaint and answer, ¶ 5). Bid Item 3 involved demolition and

replacement of the plant roof and related work (complaint and answer, ¶ 6). The awarded price for Lump Sum Work on Bid Item 3 was \$321,185 (complaint and answer, ¶ 8).

4. When work on the roof began, the parties determined that the condition of the roof was worse than they anticipated (complaint and answer, ¶ 11). In April 2000, the Government proposed to delete all work in Bid Item 3 (complaint and answer, ¶ 14). M&W submitted a proposed change order reducing the contract price by \$64,607 for deleting Bid Item 3 (complaint and answer, ¶¶ 15, 16).

5. On 28 September 2000, the Government issued unilateral Modification P00003 (complaint and answer, ¶ 18). Modification P00003 was issued under the CHANGES clause (complaint and answer, ¶ 18; R4, tab 2). The modification deleted all of Bid Item 3 except the demolition of roof top conveyors and reduced the contract price by \$236,288.50 (complaint and answer, ¶¶ 19, 21). Modification P00003 did not indicate the basis for the amount of the reduction (R4, tab 2; complaint and answer, ¶ 22).

6. Appellant continued to perform as directed (complaint and answer, ¶ 23). M&W completed the contract on 20 October 2000 (complaint and answer, ¶ 24).

7. Appellant later submitted an equitable adjustment claim for \$171,681.50 which is the difference between the reduction in the contract price per Modification P00003 (\$236,288.50) and the reduction proposed by M&W (\$64,607) (complaint and answer, ¶¶ 25-27). The contracting officer denied the claim (R4, tab 18).

8. M&W filed a timely appeal.

9. On 13 November 2001 M&W filed a motion for partial summary judgment. On 8 January 2002 the Government filed its response in opposition to appellant's partial summary judgment motion. Appellant filed a motion to compel discovery on 24 January 2002. The Government on 28 February 2002 responded. Appellant submitted a reply to the Government response on 14 March 2002.

DECISION

Appellant's Motion to Compel

M&W filed a motion to compel a Government response to appellant's first discovery request. In its response, respondent admitted that it received M&W's discovery request on 27 November 2001 and that its response was due 11 January 2002. It went on to say that the preparation of its response required the assistance of the project manager for the contract who is now stationed in Florida. The Government anticipated that it would provide its response by 15 March 2002 and it is the Board's understanding that the Government's response has been sent to appellant. Accordingly, appellant's motion is

dismissed as moot. Any concerns appellant has about the sufficiency of the response should be the subject of a new motion to compel.

As to appellant's request for expedited proceedings in this matter, the appeal does not qualify for processing under Board Rule 12. Accordingly, the appeal will be processed without preference and the speed at which the appeal moves will largely be dependent on the time it takes the parties to prepare for hearing.

Appellant's Motion for Partial Summary Judgment

M&W has moved for partial summary judgment asking the Board to determine that the parties "proceeded by means of a deductive change under the Contract's Changes clause and that the appropriate measure of the equitable adjustment of the Contract price is the extent that the change decreased the appellant's cost of performing the Contract." (App. mot. at 5)

The Government agrees that the deduction in Modification P00003 was taken pursuant to the Changes clause (Gov't resp. at 2). Addressing the measure proposed by appellant, the Government first says that appellant is, in essence, requesting a declaratory judgment which should be denied (Gov't resp. at 2-3). Assuming, *arguendo*, should the Board decide to address the proper measure of relief, respondent proposes its own standard (Gov't resp. at 3-4).

There is no dispute, and we so find, that the contracting officer issued Modification P00003 under the contract's CHANGES clause, I.44, FAR 52.243-4 (AUG 1987) (finding 2). The parties propose different methods of computing the reduction in contract price to be applied when a contracting officer deletes work under the CHANGES clause. We do not understand either party to request a ruling on the amount of the reduction.

A ruling on the method of calculating the reduction would be premature at this stage of the proceedings. We see no basis for such a ruling in either the Board's rules or our precedents. Although we have entertained motions for partial summary judgment in other appeals, we have found no Board decisions in which we have done so in the manner requested by appellant.

CONCLUSION

Appellant's motion to compel is dismissed as moot. Appellant's motion for partial summary judgment is denied.

Dated: 27 March 2002

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

I concur

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

ALLAN F. ELMORE
Administrative Judge
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. 53481, Appeal of M&W Construction Corporation, rendered in conformance with the Board's Charter.

Dated:

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