

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
Southwest Marine, Inc. ) ASBCA No. 53561  
 )  
Under Contract No. N62791-01-C-0032 )

APPEARANCE FOR THE APPELLANT: Christopher D. Devlin, Esq.  
Counsel

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.  
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Pearl Harbor, HI

OPINION BY ADMINISTRATIVE JUDGE PEACOCK  
UNDER RULE 12.3

Southwest Marine, Inc. (SWM or appellant) seeks an equitable adjustment for structural work performed on the forward uptake of the USS Hopper that appellant alleges exceeded the requirements of the contract. Appellant has elected the accelerated procedures prescribed in Board Rule 12.3 and the parties have submitted the appeal for decision on the record without hearing under Board Rule 11. Both entitlement and quantum are before us. We deny the appeal.

FINDINGS OF FACT

1. The referenced firm fixed-price contract is a Job Order (JO or contract) awarded to SWM by the Supervisor of Shipbuilding, Conversion and Repair, San Diego, California, an activity of the United States Navy (Government or Navy) under SWM's Agreement for Boat Repair N00024-92-H-8030. The negotiated contract required appellant to perform various repairs and alterations on the USS Hopper, which is a DDG-51 Class Destroyer. The USS Hopper is designated DDG-70 (*i.e.*, hull 70). The work was to commence 10 January 2001 and be completed by 14 March 2001. (R4, tab 1)

2. The contract provisions in dispute are found in Work Item 630-80-001 entitled SHIPALT DDG51-64154D, Uptake Corrosion Modifications (the work item). The work

item is specifically written for the USS Hopper and identifies the vessel at the top of each page. The work item is broken down into the following five sections: 1. SCOPE-identifying the shipboard location of the required work; 2. REFERENCES-identifying and incorporating, *inter alia*, NAVSEA STANDARD ITEMS and drawings; 3. REQUIREMENTS-identifying and describing the modifications, removals and installations to be performed; 4. NOTES-referring to the availability of the ship's Damage Control Book, and; 5. GOVERNMENT FURNISHED MATERIAL (GFM)-identifying the materials to be supplied by the Government for performance of the work. (R4, tab 3; ASR4, tab 18)

3. The SCOPE section of the work item at ¶ 1.2 "Location of Work" indicates that work would be required in both the forward (*see, e.g.,* ¶ 1.2.1) and aft (*see, e.g.,* ¶ 1.2.2) "uptake engine rooms" referred to by the parties as uptakes or stacks.

4. Among the REFERENCES identified in Section 2 of the work item are the following:

2. REFERENCES:

- a. Standard Items
- b. 630-7284239 Rev C, ShipAlt DDG-51-TY64, 154 Uptake Spaces, Str1 Corrosion Mods & MI
- c. 64154/DDG62/1039624, LAR, PYWI Discrepancies
- d. 64154/DDG51CL/1046756, LAR, Material Requirements for PYWI 64154
- e. 4720-d70-SRA2-A4, Ship Alteration Material Summary (4720/3)
- f. 803-6397261, Doors WT. Individually Dogged Arrangement
- g. 803-6397262, Doors WT. Individually Dogged Sub-Assemblies & Details
- h. 8100-1251-0309 Rev C, Doors WT. Individually Dogged Arrangement

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j. 526-7284296 Rev B, ShipAlt DDG-51-TY64, 154 Uptake Spaces, Dr Corrosion Mods & MI

k. 810-4714432 Rev G, NNSY Standard Drawing STD Pipe Hangers Fabrication Dets & Instl Instr (Non-Nuc Constr)

....

(R4, tab 3)

5. Paragraphs 3.1 and 3.1.1 of the specification's "REQUIREMENTS" section are central to the dispute. They stated:

3. REQUIREMENTS:

3.1 Accomplish structural removals, modifications and installations in accordance with 2.b as modified by 2.c and 2.d, and 2.e.

3.1.1 Install new structural closures in compartments listed in 1.2.1 and 1.2.2 in accordance with 2.b through 2.d, using 2.f through 2.h for guidance.

....

3.2 Accomplish piping removals, modifications, and installations in compartments listed in 1.2 in accordance with 2.j and 2.e.

....

(R4, tab 3)

6. Reference 2.b is a ShipAlt Installation Drawing or SID (AR4, tab 18). The SID, consisting of 28 sheets, is general for all DDG 51 Class Destroyers and contains detailed descriptions and instructions concerning corrosion-related removals, modifications and installations. In particular, the following sheets, *inter alia*, expressly describe structural work to be performed on the forward uptake. (R4, tabs 2, 16; AR4, tab 18)

a. Sheets 3 and 4: Removal and installation of deck plates

- b. Sheet 5: Trough cutouts
- c. Sheet 8: Ripout of insulation
- d. Sheet 9: Door ripout/install
- e. Sheet 11: Ripout of stiffeners
- f. Sheet 15: Trough inserts installation
- g. Sheet 18: Installation of uptake coamings
- h. Sheet 25: Fabrication details for deck plate to be inserted
- i. Sheet 27: Lists material to be removed from both the forward and aft stacks.
- j. Sheet 28: Lists materials to be installed for both the forward and aft stacks.

7. References 2.c and 2.d (*see* Requirements ¶ 3.1 above) do not contain modifications of the SID that are material to this dispute. Reference 2.e, *i.e.*, Ship Alteration Material Summary 4720/3, identifies the Government Furnished Material (GFM) that would be provided to complete the requirements of the work item. All requisite materials under the contract were to be furnished by the Government. All materials denoted on Reference 2.e (the GFM list) were included in the GFM “Kit” specified in Section 5 “GOVERNMENT FURNISHED MATERIAL” of the work item. The GFM list (and kit) included materials necessary to perform all structural work on both the forward and aft uptakes. (R4, tabs 2, 3, 4; AR4, tabs 6, 7)

8. Sheet 13 of the SID (Reference 2.b) is entitled “DOORS, 02 LEVEL INSTL.” This sheet depicts installation of doors in both the forward and aft uptakes and contains a reference reading “SEE GEN NOTES 39 AND 40.” No work other than installation of the doors is shown or noted on sheet 13. The forward stack door on the USS Hopper had already been installed at the time the ship was constructed. (R4, tab 2, sheet 13, 16)

9. GENERAL NOTES 39 AND 40 are set forth on sheet 2 of the drawing and read as follows:

39. THE FOLLOWING HULLS WILL REQUIRE THIS  
INSTALLATION ON THE FWD STACK: DDG-59, 60,  
61, 62, 63, 64, 65, 66, 67, 68 & 69

40. THE FOLLOWING HULLS WILL REQUIRE THIS  
INSTALLATION ON THE AFT STACK: DDG-51  
THROUGH DDG-78

(R4, tab 2, sheet 2)

10. Neither of the above notes was referenced in any sheet of the SID other than sheet 13. In particular, none of the sheets listed in finding 6, *supra*, referenced General Note 39 (note 39). (R4, tab 2)

11. In preparing its offer, SWM's estimator concluded that no structural work was required in the forward uptake of the USS Hopper. That conclusion was based on his interpretation of note 39 of Sheet 2 of the SID (finding 9, above). Observing that the USS Hopper, *i.e.*, DDG-70, was not listed in that note, he determined that "this installation" was not required on the vessel's forward stack and that "this installation" referred to the entire drawing, specifically, all of the corrosion-related structural modifications noted elsewhere on numerous sheets of the SID (*see* finding 6). The estimator noticed the multiple requirements for structural work on the forward stack detailed throughout the SID but considered that the repeated identification of structural work was attributable to the fact that the SID was generic and to be applied on a ship-by-ship basis with respect to all DDG-51 class vessels. The estimator understood the reference to note 39 on sheet 13 simply as a reminder meaning "don't do this door, either" on the forward stack of DDG-70. The estimator considered that if note 39 was not intended to apply to all forward stack structural work, the Government would have used delimiting prefatory language such as "when referenced to this note." (AR4, tab 3) There is no clear explanation in the record distinguishing between "structural" work which the contractor alleges it was not required to perform on the forward stack and numerous other allegedly non-structural work that SWM concedes it was required to perform on that part of the vessel. For example, appellant does not dispute that it was required to perform the work that was expressly discussed in ¶ 3.2 (finding 5, above).

12. On 16 January 2001, appellant submitted an Inspection/Deficiency Report (IDR) requesting a change order to accomplish the structural modifications to the forward stack. The IDR stated that during the estimating process SWM had interpreted note 39 of the SID as not requiring such work but after inspecting the USS Hopper, appellant discovered that the structural work had not previously been performed. (R4, tab 6; AR4, tab 5)

13. On 19 January 2001, the Government rejected SWM's request stating that the contract required the structural work on both uptakes and that General Notes 39 and 40 only referred to installation of doors. The Government directed appellant to perform the structural corrosion work on both uptakes. (R4, tab 7)

14. After SWM's subsequent request for an equitable adjustment of 19 February 2001 was denied by the Government on 7 March 2001 (R4, tabs 9, 10, 11), appellant filed a claim requesting a contracting officer final decision on 30 April 2001 (R4, tab 12).

15. The contracting officer denied the claim in a final decision dated 19 July 2001 and SWM timely appealed by letter dated 3 October 2001 (R4, tab 13; AR4, tab 1). It is undisputed that the amount of damages, if entitlement is found, is \$55,432 (Gov' t br. at 15).

### DECISION

Appellant contends that it was not required to perform structural work on the vessel's forward uptake. Its position is premised on note 39 of the SID (finding 9). Because the USS Hopper was not one of the hulls listed in that note as requiring "this installation," SWM argues that none of the SID's corrosion-related "structural" requirements on the forward uptake were applicable to that ship. According to appellant, it reasonably construed ambiguous contract provisions concerning the scope of work on the forward stack and, therefore, the contract should be construed against the Government as drafter of the agreement. We consider that appellant's interpretation of the contract is unreasonable and created patent ambiguities that it failed to resolve prior to bidding.

A reasonable interpretation of an ambiguous contract is an essential prerequisite to invoking the doctrine of *contra proferentem*. When assessing the reasonableness of a contractor's interpretation, the Board will apply elementary principles of interpretation which require that the contract be read as a harmonious whole, if possible, and that all provisions of a contract be given effect and none rendered "useless, inexplicable, inoperative, void, insignificant, meaningless, or superfluous." *Hol-Gar Manufacturing Corp. v. United States*, 169 Ct. Cl. 384, 395, 351 F.2d 972, 979 (1965); *United Pacific Insurance Co. v. United States*, 204 Ct. Cl. 686, 692, 497 F.2d 1402, 1405 (1974); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991); *Central Mechanical, Inc.*, ASBCA Nos. 26543, 26584, 85-1 BCA ¶ 17,711 at 88,392. If adopted, appellant's interpretation would render superfluous sheet after drawing sheet that clearly require extensive corrosion-related work in the forward stack, the specification's unequivocal instruction to perform that work, and the GFM list that includes materials to be incorporated into that work. SWM's selective reliance on note 39, while disregarding these other provisions, distorted the meaning and intent of the contract. Consequently, that interpretation is unreasonable.

Appellant bases its position on a strained construction of the words "this installation" in note 39. Appellant argues that the words comprehensively encompass all work in the forward stack that is classifiable as "structural." We disagree. Paragraph 3.1 of the specification requires the accomplishment of numerous structural "removals, modifications and installations." The requirements for "removals, modifications, and

installations” are stated in the plural, are not confined to “installations” and are not interchangeable or coterminous with the words “this installation.” The drawing sheets, in particular, show extensive ripouts or “removals” on the forward stack as well as “installations.” Under SWM’s interpretation the specification’s use of three terms to describe the structural work is gratuitous surplusage. We are unable to conclude that the singular noun “installation” was intended here to have a plural meaning. Nor can we find that the extensive requirements for “removals, modifications, and installations” in the specifications and drawings are subsumed within the term “installation” in note 39.

In addition, the fact that note 39 is referenced only on one specific drawing dictates against an all inclusive interpretation of the terms “this installation.” Note 39 is referenced solely on sheet 13. That sheet of the SID concerns exclusively the installation of new doors and provides the context for properly interpreting the scope of note 39. According to appellant, the reference in sheet 13 to note 39 merely reiterated the omnibus exclusion of all structural work on the forward stack. Under SWM’s interpretation, the sheet 13 reference meant “Don’ t do the door either.” In so construing these provisions, appellant effectively renders the sheet 13 reference insignificant and superfluous. To the contrary, we consider that sheet 13 answered the obvious question posed by note 39, *i.e.*, what “installation.” The note only addressed the installation of doors. In the context of this contract, the only reasonable construction and that offered by the Government is that note 39 eliminated the requirement for “this installation” of new doors on the forward uptake of ships listed in the note, including the USS Hopper.

Moreover, SWM’s broad interpretation of the scope of note 39 fails to come to grips with the fact that the GFM to be provided specifically for the USS Hopper included all materials shown in the SID for accomplishment of modifications and installations on the forward, as well as the aft, uptake. Appellant’s interpretation necessarily discounts the listing of purportedly extra, unnecessary GFM as inferior to note 39, as interpreted by it, rather than reasonably reconciling the conflict.

We also consider that, if SWM believed that note 39 overrode the contract’s repeated, unambiguous requirements for “removals, modifications and installations” on the forward stack, that interpretation created patent ambiguities that it had a duty to resolve by inquiry prior to submitting its offer. *Cf.*, *Metroplex Industrial Constructors, Inc.* ASBCA No. 30722, 85-3 BCA ¶ 18,309. The rule that potential contractors have a duty to inquire about major patent discrepancies and glaring conflicts has been applied numerous times. *E.g.*, *S.O.G. of Arkansas v. United States*, 212 Ct. Cl. 125, 131, 546 F.2d 367, 370 (1976); *Newsom v. United States*, 230 Ct. Cl. 301, 303, 676 F.2d 647, 649-50 (1982). Here not only were the conflicts created by its interpretation patent, appellant actually noticed the conflicts and chose to resolve them without inquiry. It is well settled that the contractor had the obligation to seek clarification and may not recover in these circumstances. *E.g.*, *James A. Mann, Inc. v. United States*, 210 Ct. Cl. 104, 535 F.2d 51 (1976); *Beacon Construction Co. v. United States*, 161 Ct. Cl. 1, 6-7, 314 F.2d 501, 504 (1963).

The appeal is denied.\*

Dated: 4 April 2002

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ROBERT T. PEACOCK  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signature continued)

I concur

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

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\* The parties filed cross motions for summary judgment. Given the short period of time to complete the record and decide this accelerated appeal, the Board deferred ruling on the motions pending issuance of this decision. Given our disposition, those motions are now moot.

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. 53561, Appeal of Southwest Marine, Inc., rendered in conformance with the Board's Charter.

Dated:

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