

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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AST Anlagen-und Sanierungstechnik GmbH) ASBCA No. 49969
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Under Contract No. DAJA76-85-C-0073)

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OPINION BY ADMINISTRATIVE JUDGE PAUL

This is an appeal of a deemed denial by the contracting officer of AST Anlagen-und Sanierungstechnik GmbH's (AST) delay claim in an amount of DM450,525. The Contract Disputes Act, 41 U.S.C. §§ 601-613 (CDA), is applicable. Only issues of entitlement are before us for decision.

FINDINGS OF FACT

1. On 6 November 1984, the Army awarded Contract No. DAJA76-85-C-0073 to AST in a fixed-price amount of DM1,329,607. The contract's subject matter was the renovation and replacement of roofing, painting, plastering, exterior wall insulation, electrical lines and water lines for three Army family housing buildings located at Martin Luther King Village (MLK) in Mainz, Germany (R4, tab 1).

2. Title 5 of the contract's specifications set forth very detailed requirements concerning the thermal insulation system. For example, the system had to comply with German construction regulation (DIN) 4108 (R4, tab 1 at 35). In addition, the specifications stressed that the insulation provided by AST had to be part of a unitary system. They stated: "In principle, a complete thermal insulation composite system shall be used i.e. all required materials – as complete system – shall bear a test sign on their fire reaction state accepted by the 'Institut fuer Bautechnik' in Berlin" (R4, tab 1 at 36).¹

¹ The German phrase is translated as "Institute for Construction Technology."

3. The insulation system itself was described in these terms:

Exterior wall insulating system with lime cement plaster, shall be furnished and applied on the portative and prepared subbase acc. to manufacturer's directives. Insulating plates, SE, of polystyrene 75 – 80 mm thick, with bilateral scoring for the mechanical fixing to subbase and surrounding notches resp. double groove shall be applied on the prepared facade, truly aligned, with a bonding agent – cement mixture, consisting of bonding agent concentrate and cement P 35, whereby the cement shall have the main weight portion acc. to manufacturer's working directives[.] Unevennesses, as well as projections and resets of facade shall be leveled with insulating material in various strengths. Reinforcement of insulating plates:

Wall surface shall be provided with reinforcing mortar containing less than 2 % organic parts, thickness approx. 6 mm, (in one or two working phases) acc. to manufacturer's directives. Glass fibre reinforcing material [alkaliproof and slideproof equipped with a mesh width 4 – 7 mm, and tearing resistance of at least 40 kp/cm = 200 kp/cm (400 N/cm = 200 N/5 cm) with 10 cm overlapping at the joints, shall be fastened] are to be bedded in. The reinforcing mortar may be applied manually or by means of a plaster machine. It is essential that the reinforcing material will be centrally imbedded. Entire thickness of reinforcing coating incl. reinforcing mesh approx. 6 mm – 8 mm. Double material reinforcement at the openings: All corners of an opening in the facade (esp. windows) shall be additionally provided with reinforcing strips approx. 20 x 30 cm, to be horizontally laid on the already imbedded reinforcing material and imbedded acc. to the directives of the manufacturer. The surface shall be provided with an evenly applied thin layer of finish plaster. Exterior and/or finish plaster as floated plaster on lime-cement basis. Exterior coating can be applied when reinforcing coating has dried and set (8 – 14 days depending on weather). Reinforcing coating has sufficiently set if it can no longer be pressed in by fingernail. Prior to application of exterior plaster the reinforcing coating will be wetted should there be warm or dry weather. Bonding primer shall be applied acc. to manufacturer's instructions. Light exterior plaster acc. to DIN 18550 and additional sheet to DIN 18550 shall be used. Both DIN standards and manufacturer's working directives shall be observed.

(R4, tab 1 at 42-43)

4. Although the contract did not specify a “brand name or equal,” the insulation system most closely resembling that described in the specifications was manufactured by the Firm Heck in Germany. This system had been used successfully by several contractors working at MLK, including AST (tr. 1/95-97, 2/38).

5. The Army issued a notice to proceed to AST on the date of contractual award. The contract required that AST commence work within 20 days of receipt of this notice, *i.e.*, on 26 November 1984 (R4, tab 1).

6. The parties held a pre-performance conference on 4 December 1984. The memorandum of this meeting indicates that AST’s manager, Herr Tomo Matasic, advised the Army that AST would use an insulation system that would comply with the specifications (ex. A-2). However, Herr Matasic did not inform the Army that, at the time when he prepared AST’s bid, he had already decided to use an insulation system manufactured by the Firm Pumagro (tr. 1/33-34, 97).

7. On 3 December 1984, Mr. Roy Pack, the contracting officer’s representative (COR), forwarded a memorandum to the Chief of the Regional Contracting Office (RCO), in Frankfurt, in which he wrote, in pertinent part:

1. This contract is for the installation of exterior wall insulation, plaster and painting. A Suspension of Work is requested until 1 April 1985. There are many problems the contractor will incur during the winter months that prevent an acceptable finished product.
2. Freezing temperatures prohibit the plastering and painting of the styropor. Rain and moisture are trapped between the styropor and the wall surface during installation. These conditions will void the manufacturer’s warranty.
3. Therefore, it is requested the start date begin 1 April 1985 and continue for the entire performance period of 100 days.

(R4, tab 2) In a letter to the Army of 7 December 1984, Herr Matasic also requested a work stoppage. He stated, in part:

Due to the late scheduled date for the pre-con on 4 Dec 84 concerning the Christmas holidays, as well as the stop work between the years (23 Dec 84 – 6 Jan 85) it is not possible to perform suitable work in the remaining week before Christmas.

We will open our job-site on 7 Jan 85.

(R4, tab 3)

8. On 18 December 1984, the contracting officer issued bilateral Modification No. P00001 which provided:

a. The purpose of this supplemental agreement is to add:

No work will be required during the period 06 Nov 84 and 06 Jan 85. The contractor may [sic] however, perform work during all or any part of this period upon giving prior written notice to the Contracting Officer or the COR.

b. The new performance completion date will be 17 Apr 85 without any additional cost to the US Government.

c. This modification does not increase or decrease the amount of funds obligated.

(R4, tab 4)

9. As a result of this modification, AST did not perform any work at the job site until 7 January 1985 (R4, tabs 3, 4). On or about 24 January, AST informed the Army's inspector that it desired to hold a meeting to discuss "the new thermal insulation system" (ex. A-10). The meeting took place on 28 January, the same date when AST informed the Army in writing of its intent to use the Pumagro insulation system (R4, tab 8; ex. A-10, G-7). In attendance were representatives of the Army, AST, Firm Heck, and Firm Pumagro. During the meeting, representatives of both firms discussed the salient characteristics of their respective insulation systems. At the meeting's close, the parties had not reached agreement regarding the identity of the two insulation systems (R4, tab 45). It was apparent, however, that the Army's representatives were unfamiliar with the Pumagro system (tr. 1/95, 2/38). Accordingly, they reserved the right to determine "whether both systems are equal" (R4, tab 45).²

10. Mr. Ingebrigsten, who was COR for most of the contract's term, testified that, because the Army had no experience with the Pumagro system, it needed to review certain technical information before approving it for use on the project. Specifically, he stated that

² It can be inferred from the meeting minutes that Mr. Pirollo, the project designer, had used the Heck system as a model in formulating the specifications for the insulation (R4, tab 45).

the Army had to analyze the technical specifications and would require “some sort of certified papers from a testing laboratory” as part of the approval process (tr. 2/72-73).

11. In a letter to AST of 23 January 1985, Firm Pumagro stated that there were differences between its “thick bed” insulation system and “other systems offered on the market” (R4, tab 7). These differences were confirmed through an analysis performed by Firm Heck and forwarded to the Army on 4 February 1985 (R4, tab 12). In order to clarify the situation, on 12 February 1985 Mr. Ingebrigsten, the COR, requested that the Army’s design engineer perform “a technical review between the material as specified in subject contract and the material submitted by the Firm AST” to determine if the Pumagro system was “equal or inferior” to the specified system (R4, tab 15).

12. Although the Army had neither issued a stop work order nor rejected the Pumagro system, AST had already forwarded a letter to the contracting officer on 7 February 1985 in which it contended that it was incurring damages of DM20,000 per day because of its purported inability to install the Pumagro system. AST stated that its damages had commenced on 21 January 1985, which it described as the date of the parties’ meeting (R4, tab 17). However, that meeting did not take place until 28 January 1985 (finding 9). AST properly certified its claim in a letter dated 18 July 1990 (R4, tab 77).

13. Except for six days when no work could be performed at the job site because of freezing temperatures (28 January, 11-15 February), AST continued to work without interruption during the winter of 1985 (ex. G-7). Prior to installing the insulation, AST was required to build scaffolding which reached to the buildings’ roofs. The job site logs demonstrate that this work was performed during the period of 22 January until 5 February 1985 (exs. G-7, A-10).³ AST began preparatory work for installation of the insulation system on 6 February 1985 immediately after completing the requisite scaffolding work. Except for the interruption caused by the freezing temperatures on 11-15 February, AST continued preparatory work through 1 March 1985. (Ex.. G-7; tr. 2/40) Even though the Army had not approved the Pumagro system, AST verbally informed the Army’s inspector, Mr. Salsal, on 1 March 1985 that it would begin installing the new insulation on 4 March 1985 (ex. G-7).⁴ On that date, 1400 square meters of insulation boards were delivered to the job site, and AST began to install the Pumagro insulation (ex. G-7).

³ Clause F-4 of the contract, entitled “Weather Delays,” stated, in pertinent part: “Unless unusually severe weather conditions prevail, no extension will be granted for delays experienced under normal seasonal weather conditions.” (R4, tab 1 at 10). Snow and freezing temperatures are normal conditions in German winters.

⁴ In a letter dated 25 February 1985, AST informed the COR that it intended to begin installing the Pumagro system on the assumption that the Army had approved its use (R4, tab 19).

14. On 3 April 1985, AST requested a time extension of 85 days. Included in this claim were 35 days, encompassing the period of 28 January 1985 until 4 March 1985, which related to the purported delay in approving the Pumagro system. Most of the remainder of the claim dealt with weather delays (R4, tab 27).⁵

15. In a letter dated 25 April 1985, the Army determined that the “salient characteristics” of the Pumagro system complied with the specifications (R4, tab 33). As a result, AST was informed that it could continue its work (tr. 2/14).

16. Bilateral Modification No. P00002 was executed by the parties on 30 April 1985. Its purpose was to extend the performance date to 21 June 1985, “without any additional costs to the US Government,” as a result of unspecified “unusually severe weather conditions and Government cause [sic] delay” (R4, tab 29).

17. Notwithstanding the modification, on 15 May 1985, AST forwarded a claim to the Army for 35 days of delay (28 January 1985 to 4 March 1985) as a result of the Government’s failure immediately to accept the Pumagro system. AST’s claim stated that it had been damaged in a total amount of DM450,525 (R4, tab 36). AST subsequently attempted to negotiate its claim with a contract specialist for the Army, but its settlement attempts were never approved by a contracting officer (R4, tabs 41, 42, 48, 50, 51).

18. On 21 May 1996, AST appealed the contracting officer’s deemed denial of its claim (R4, tab 80). The appeal was docketed as ASBCA No. 49969.⁶

DECISION

AST’s delay claim has no validity. Except for six days during the alleged delay period when AST could not work due to freezing temperatures, it continued to labor without interruption during the winter of 1985. First, it performed the prerequisite scaffolding work during the period of 22 January until 5 February 1985. AST then began preparatory work for installing the new insulation system on 6 February 1985 immediately after completing the scaffolding work. It continued performing this preparatory work through 1 March 1985 and subsequently made a unilateral decision to begin installing the new Pumagro insulation on 4 March 1985. (Finding 13) Based upon the underlying factual

⁵ Pursuant to Clause H-8 of the contract, “Work Schedule,” AST could not perform work on weekends and holidays without the contracting officer’s authorization (R4, tab 1 at 16). Accordingly, no work of any kind was performed on weekends and holidays during the purported 35-day delay period (exs. A-10, G-7).

⁶ On 26 February 1998, the contracting officer issued a final decision which purported to deny AST’s claim (R4, tab 82).

record, AST did not stop work and was not delayed by the Army with respect to the insulation issue.⁷

CONCLUSION

AST's delay claim is denied in its entirety.

Dated: 30 June 2004

MICHAEL T. PAUL
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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. 49969, Appeal of AST Anlagen-und Sanierungstechnik GmbH, rendered in conformance with the Board's Charter.

Dated:

DAVID V. HOUPE
Acting Recorder, Armed Services
Board of Contract Appeals

⁷ The Army's motion to amend its answer to state an affirmative defense of fraud is denied as moot.

