

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
Rio Construction Corporation ) ASBCA No. 54273  
Under Contract No. DACW17-01-C-0013 )

APPEARANCES FOR THE APPELLANT: Fernando Barnés Rosich, Esq.  
Rebeca Barnés Rosich, Esq.  
Barnés Law Firm  
Ponce, Puerto Rico

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.  
Engineer Chief Trial Attorney  
John D. Brady, Esq.  
Brooks W. Moore, Esq.  
Engineer Trial Attorneys  
U.S. Army Engineer District, Jacksonville

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY  
PURSUANT TO BOARD RULES 11 AND 12.3

This appeal involves matters of contract interpretation concerning the government's estimated quantities of fill material. Appellant elected to proceed under the Board's accelerated procedures pursuant to Board Rule 12.3 and the appeal has been submitted on the record under Board Rule 11. We sustain the appeal.

FINDINGS OF FACT

Contract No. DACW17-01-C-0013, a small business set-aside contract, was awarded to appellant Rio Construction Corporation in the amount of \$10,555,240.00 for a flood control project at Rio Grande de Manati, Barceloneta, Puerto Rico (R4, tabs 7, 33A).

The contract contained the following standard FAR clauses: FAR 52.233-1, DISPUTES (DEC 1998); FAR 52.236-3, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984); and FAR 52.243-4, CHANGES (AUG 1987) (R4, tab 33A at 00700-54, -57, -63).

A pre-bid project site visit was conducted by the government on 1 August 2001, and attended by Mr. Ruben Sanchez on behalf of appellant. The government's memorandum of the site visit reflects that, during the introductory briefing provided to potential bidders, Mr. Edwin Cuebas, Chief, Contract Administration Section, Antilles

Construction Office, described the major features of the specified work as including “channel excavation, levee construction, internal drainage, improvement of three highway crossings, culvert construction, construction of a new boat ramp and the use of 2 borrow sites to excavate select fill material.” He went on to explain that the allowable excavation depth in the two project borrow areas would be restricted to the elevations shown on the drawings, that it was probable that the material from these two sites would not be sufficient, and that contractors might need to use “commercial quarry sites and/or private borrow sites” in the vicinity. (R4, tab 4 at 1-4)

The government’s memorandum also records the following question from a potential bidder and Mr. Cuebas’ answer:

- e. Is contractor responsible for getting all the borrow material required to complete the project? Answer: Yes. If borrow material from the two project borrow sites is not sufficient you will have to get material from commercial quarries and/or [p]rivate borrow sites. The Antilles Office will request that a bid line item be added by amendment to the contract to [sic] for this eventuality.

(R4, tab 4 at 4)

Following the pre-bid site visit, the government issued Amendment No. 0002 to the solicitation which, among other things, authorized the contractor to obtain fill from a commercial quarry and revised the bidding schedule set forth in Section 00010 for Contract Line Item (CLIN) 0005 identified as “**FILL: LEVEE/RIVERBED/FARM ROAD (TOTAL ESTIMATED QUANTITY: 888,000 CUBIC METERS)**” (R4, tab 33A at 00010-3, tab 33B).

The estimated quantities for CLINs 0005AA, 0005AB, and 0005AC were revised in Amendment No. 0003 to the solicitation to reflect that 888,000 cubic meters of fill material were available as follows:

0005AA	FILL FROM PROJECT EXCAVATIONS (ESTIMATED QUANTITY)	166,000
0005AB	FILL FROM BORROW AREA (ESTIMATED QUANTITY)	266,000
0005AC	FILL FROM COMMERCIAL QUARRY (SEE NOTE (5)) (ESTIMATED QUANTITY)	456,000

Note (5) provided: “THE CONTRACTOR SHALL NOT EXCEED THE AMOUNT OF THIS LINE ITEM UNTIL FILL TAKEN FROM LINE ITEMS 0005AA AND 0005AB HAS BEEN DEPLETED.” (R4, tab 33B at 00010-3, -8)

The contract also contained the standard FAR 52.211-18, VARIATION IN ESTIMATED QUANTITY (APR 1984), clause which provided in relevant part:

If the quantity of a unit-priced item in this contract is an estimated quantity and the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity, an equitable adjustment in the contract price shall be made upon demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity.

(R4, tab 33A at 00700-11)

Additionally, Section 01270, MEASUREMENT AND PAYMENT, of the contract explained in paragraph 1.2, UNIT PRICE PAYMENT ITEMS, that “[p]ayment items for the work of this contract on which the contract unit price payments will be made are listed in the Section 00010 BIDDING SCHEDULE and described below.” As revised by Amendment No. 0002, paragraph 1.2.2.1, Payment for Embankment Fill Material, further provided that “[p]ayment will be made for material placed as required in the west levee, east levee, river bed, and farm road ramp fills and embankments included” in CLINs 0005, 0005AA, 0005AB and 0005AC of the Section 00010 bidding schedule. Paragraph 1.2.3.1, Payment for Select Fill, was not changed and continued to provide: “NOTE: All Select Fill shall be obtained from a commercial quarry or Contractor furnished source approved by the Contracting Officer. Payment will be made for material placed as required in the road embankments including road ramps and detour roads . . . , boat ramp access road, river plugs, and around culvert structures included in” CLINs 0011, 0022AA, 0023AA, 0024AA, 0025AA, 0026AA, and 0033. (R4, tab 33A, § 01270 at 5-7, tab 33B)

Also of relevance are two provisions from Section 02331, EMBANKMENT CONSTRUCTION AND CHANNEL EXCAVATION. As revised by Amendment No. 0002, paragraph 1.3, GENERAL CONDITIONS, provides in relevant part at 1.3.3, Materials:

Materials for the construction of those features requiring “Embankment Fill” and/or “Channel Fill” may be obtained from the provided borrow source, the required excavations and/or a commercial source selected by the Contractor and approved by the Contracting Officer. . . . The Contractor

shall submit to the Contracting Officer the source or sources from which the Contractor intends to obtain the “Select Fill” required for this contract.

Paragraph 1.4, SUBMITTALS, further provided that government approval was required for borrow area submittals and that the contractor was to provide a written statement to the government indicating whether it would use the government-furnished borrow area, commercial borrow area(s), or a combination of borrow areas. (R4, tab 33A, § 02331 at 6, 8)

Prior to submission of its bid, appellant used the survey data and plans provided by the government to verify the estimated fill quantities and concluded that there was more fill available on the project site than had been estimated by the government (R4, tab 22). The Borrow Area Site Plan shows both East and West Borrow Areas, but indicated that only the East Borrow Area was available for this project (R4, tab 33A). The pre-bid fill estimates computed by appellant indicated that the East Borrow Area would provide approximately 623,338 cubic meters of fill material and appellant concluded that all of the fill required for CLIN 0005 was available from project excavations, CLIN 0005AA, and the East Borrow Area, CLIN 0005AB. Thus, appellant based its prices for CLINs 0005AA and 0005AB on the costs to cut, haul, place and compact the fill volume using its estimates instead of the government’s estimates and bid a lower price for CLIN 0005AC because it did not expect to have to use fill from commercial sources. (R4, tab 22)

Appellant’s bid prices for CLIN 0005 were as follows: CLIN 0005AA – 166,000 cubic meters at a unit price of \$3.50, a total of \$581,000; CLIN 0005AB – 266,000 cubic meters at a unit price of \$6.60, a total of \$1,755,600; and CLIN 0005AC – 456,000 cubic meters at a unit price of \$4.80, a total of \$2,188,800 (R4, tab 2 at 1).

By a letter dated 14 September 2001, Mr. Harley R. Hartley, the contracting officer, requested that appellant verify its overall bid and several specific CLIN bid prices, including the \$4.80 per cubic meter price for CLIN 0005AC, because they were “low when compared with the Government Estimate” (R4, tab 5). The record reflects that the bids for CLIN 0005AC ranged from appellant’s low bid of \$4.80 to a high of \$13.35, and that the bid closest to appellant’s was \$8.80 (R4, tab 1). The next lowest price bid for CLIN 0005AB was \$7.30 a cubic meter, or a total of \$1,941,800 (compl., ¶ 11). In a letter dated 25 September 2001, appellant confirmed the accuracy of its bid, and specifically of the CLIN 0005AC price, and further confirmed that there were no mistakes in its estimate (R4, tab 6). The contract was awarded to appellant on 27 September 2001 (R4, tab 7).

By a letter dated 7 March 2002, appellant advised the government that it was proceeding with clearing and grubbing of the East Borrow Area and intended to use all of the material available there (R4, tab 14). There is no further record evidence relating to

the CLIN 0005 fill requirements until 7 October 2002, when the government directed appellant to stop using material from the East Borrow Area for levee fill and to provide the levee construction fill under CLINs 0005AA and 0005AC because the estimated quantity for CLIN 0005AB had been “exceeded in excess of 115%.” The government reserved “the right to request an adjustment in [the contract] price for the quantity over 115% as per the Variations in Estimated Quantity Clause of the contract.” (R4, tab 21)

Appellant’s response explained that it had computed its own estimate of the available fill, which had been reinforced by its pre-construction surveys indicating that the East Borrow Area contained approximately 1,200,000 cubic meters, an even a larger volume of fill than it had previously estimated. It requested that the government reconsider its position and permit it to “use the East Borrow Area for the embankment fill, as per Note 5 in Section 00010, [because] the fill taken (not *estimated* fill quantity) from Line Items 0005AA and 0005AB has *not* been depleted.” (R4, tab 22)

The government denied the request in a letter dated 30 October 2002, in which the contracting officer’s authorized representative (COR) asserted that appellant was required to provide 456,000 cubic meters of fill for levee construction under CLIN 0005AC. He did, however, indicate a willingness to allow appellant to provide the 456,000 cubic meters of fill from the East Borrow Site, but at the CLIN 0005AC bid price of \$4.80, and to permit appellant to provide any additional material above 456,000 cubic meters under CLIN 0005AB at the \$6.60 price bid, subject to an adjustment under the Variation in Estimated Quantity clause. (R4, tab 23)

By a letter dated 1 November 2002, appellant agreed to continue using the East Borrow Area under the conditions proposed by the COR while it pursued a claim under the Disputes clause (R4, tab 24). On 8 November 2002, the contracting officer issued unilateral Modification No. P00011, at no change to the contract price, directing appellant to cease production under CLIN 0005AB and changing CLIN 0005AC to provide that 456,000 cubic meters of fill be obtained “from Commercial Quarry or East Borrow Area (See Notes (5) & (8))(Estimated Quantity).” The unit price remained unchanged at \$4.80. The new Note (8) added by Modification No. P00011 stated:

The Contractor may use the East Borrow Area as the source of fill for Line Item 0005AC in lieu of or in addition to a Commercial Quarry for a total Estimated Quantity of 456,000 cubic meters for Line Item 0005AC. All other requirements of the plans and specifications related to East Borrow Area and Section 02331, Embankment Construction and Channel Excavation, remain the same.

(R4, tab 33C)

On 7 February 2003, appellant submitted a certified claim asserting that \$4.80 per cubic meter price did not cover its costs of extracting fill material from the East Borrow Area for CLIN 0005AC. Although it had initially asserted it should be paid at the CLIN 0005AB rate of \$6.60, the claim requested only an additional \$0.78 per cubic meter in direct costs associated with 86,028.90 cubic meters of fill under CLIN 0005AC, reflecting a unit cost of \$5.58 per cubic meter. The total amount claimed was \$67,102.54. (R4, tab 3) On 12 May 2003, the contracting officer denied the claim, finding that appellant was ignoring the estimated quantities in CLINs 0005AA, 0005AB, and 0005AC and that a reasonable bidder would have interpreted the bid schedule in such a way as to “require delivery of the quantity of fill indicated from each of the sources in CLIN 0005.” In his view, appellant had concealed information during the bid process and was now basing its claim upon an unbalanced bid. (R4, tab 1 at 3)

Appellant asked the contracting officer to reconsider his decision in a letter dated 2 June 2003. It pointed out that the government had provided no explanation as to how the estimated quantity of 266,000 cubic meters for CLIN 0005AB had been computed when the cross sections indicated that nearly three times as much fill was available and why CLIN 0005AC had been included when it was not needed. It asserted that the government’s insistence that fill material had to be extracted from the CLIN 0005 sources by location, no matter how erroneous the estimates, was contrary to statements made by Mr. Cuebas at the pre-bid site visit and that it had correctly interpreted CLIN 0005AC to be a contingency item. (R4, tab 31) The contracting officer reiterated his decision on 9 July 2003 (R4, tab 32). This timely appeal was docketed on 7 August 2003.

### DISCUSSION

At issue in this appeal are matters of contract interpretation, the rules for which are familiar. We are to read the contract as a whole and give reasonable meaning to all of its provisions. *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972 (Ct. Cl. 1965). A contract term is unambiguous if there is only one reasonable interpretation. *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1544 (Fed. Cir. 1993). Conversely, a contract is ambiguous if it is susceptible to two different, yet reasonable interpretations, each of which is consistent with the contract terms and conditions. *See Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997).

The contract interpretation issues we are to decide involve the CLIN 0005 estimates of the quantities of embankment/channel fill material available from three different sources. The government’s position is that appellant was required to obtain fill material from each of three sources listed in CLIN 0005, and that appellant’s interpretation is inconsistent with the line items and the terms and conditions of the contract which specify government approval of fill sources; in particular, paragraphs 1.3.3 and 1.4 of Section 02331. Appellant’s position is that the contract did not require it to obtain fill material from all three potential sources, and specifically the commercial

quarry, and that the provisions relied upon by the government do not support its argument.

For the following reasons, we conclude that the government's interpretation is unreasonable and, therefore, there is no ambiguity. CLIN 0005 required appellant to provide a total estimated quantity of 888,000 cubic meters of embankment/channel fill material. It listed three sources for this fill and provided estimated quantities of the material available from each source. There is nothing in either the Section 00010 Bidding Schedule, or in CLIN 0005 itself, that requires the contractor to obtain fill material from all three potential sources, much less in the quantities estimated.

The specifications likewise have no such requirement and our consideration of the contractual provisions relied upon by the government does not persuade us otherwise. Indeed, we fail to see how these provisions are even relevant. Nevertheless, it is grammatically reasonable to interpret the first sentence of paragraph 1.3.3 of the Embankment Construction and Channel Excavation provisions of Section 02331 to mean that the words "selected by the Contractor and approved by the Contracting Officer" modify the words "a commercial source." This interpretation is also consistent with the government's apparent desire to approve fill material (in particular select fill material) obtained from sources other than the project site. Thus, paragraph 1.3.3 of Section 02331 goes on to require that the contractor submit the source(s) from which it intends to obtain select fill material to the contracting officer. Paragraph 1.2.3.1 of the Section 01270 Measurement and Payment provisions likewise provides in relevant part that "[a]ll Select Fill shall be obtained from a commercial quarry or Contractor furnished source approved by the Contracting Officer." There are no similar approval requirements stated in the payment provisions for embankment fill material contained in paragraph 1.2.2.1 of Section 01270 or, for that matter, in any other contractual provisions. Further, when read in conjunction with these provisions, the Submittals provisions of paragraph 1.4 of Section 02331 require only that the contractor notify the contracting officer about where it intends to obtain fill material and to obtain approval of submittals that involve borrow areas other than those provided by the government at the project site.

Moreover, to require appellant to obtain fill embankment/channel fill material from all three potential sources is contrary to the normal progression of obtaining fill which is based upon cost considerations. Thus, for CLIN 0005, fill would be taken first from the project excavations, CLIN 0005AA, the cheapest source, then from the government provided East Borrow Area at the project site, CLIN 0005AB, and finally from a commercial quarry, CLIN 0005AC, the most expensive source. That such a progression was anticipated by the government is confirmed by the discussion of Note (5) in its brief, which explains that the purpose of Note (5) was to "insure that cheaper, on-site material is used before the Government pays a higher price for commercial quarry fill . . . . [And that] [t]he Government obviously did not expect that a Contractor would have a lower price for fill from the commercial source than for the on-site borrow area." (Gov't br. at 13-14)

The record contains evidence that CLIN 0005AC was added by Amendment No. 0002 because, as Mr. Cuebas explained at the pre-bid site visit, the government was under the impression that there would not be sufficient embankment fill material available from the two project sites. There was no evidence that the government intended to use the East Borrow Area for any other purpose. On the contrary, the Borrow Area Site Plan infers that the East Borrow Area had been dedicated to this project in as much as it indicated that the West Borrow Area was not available. Finally, the independent verification appellant performed of the fill volume available at the project site, together with its pre-construction surveys, establish that the government was mistaken and that there was more than enough fill available from project excavations, CLIN 0005AA, and the East Borrow Area, CLIN 0005AB.

Contrary to the government's contention, there is no bar to our consideration of this extrinsic evidence because it does not introduce an ambiguity by adding to or modifying any of the contract terms. *See McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1434-35 (Fed. Cir. 1996). Rather, we view this to be evidence of the statements and actions of the parties before execution of the contract which give meaning to its terms. *See Gibbs v. United States*, 358 F.2d 972, 979 (Ct. Cl. 1966); *The Ryan Company*, ASBCA No. 50466, 99-2 BCA ¶ 30,445 at 150,434.

The government further asserts that appellant simply disregarded the estimated quantities and submitted an unbalanced bid giving it an unfair advantage. Appellant disputes this assertion. Unbalanced bid issues typically are associated with contract formation and involve a two-part inquiry into whether the bid is mathematically imbalanced, *i.e.*, whether it is based upon nominal prices for some work and enhanced prices for other work, and, if so, whether it is materially imbalanced and must be rejected because there is a reasonable doubt that it will result in the lowest ultimate cost to the government or will adversely affect the integrity of the competitive bidding system. *See SMS Data Products Group, Inc. v. United States*, 900 F.2d 1553, 1557 (Fed. Cir. 1990); *Storage Technology Corporation*, GSBCA No. 9345-P, 88-2 BCA ¶ 20,667 at 104,445; *SAF Engineering Associates, Inc.*, B-275740, 97-1 CPD ¶ 118. Additionally, FAR 52.214-10(e) and FAR 52.214-19(d) state that a bid is materially unbalanced if "it is based on prices significantly less than cost for some work and prices which are significantly overstated in relation to cost for other work, and if there is a reasonable doubt that the bid will result in the lowest overall cost to the Government even though it may be the low evaluated bid."

The contracting officer has broad discretion in determining whether a bid is materially unbalanced, *SMS Data Products Group*, 900 F.2d at 1557, and may reject such a bid if it poses an unacceptable risk to the government. FAR 14.404-2(g), FAR 15.404-1(g)(1)-(3), FAR 52.214-10(e), FAR 52.214-19(d). Here, the contracting officer asked appellant to verify its bid. Otherwise, there is nothing in the record to suggest that he might have suspected that the bid was unbalanced, much less materially unbalanced.

In any event, when we apply the accepted definitions, it does not appear that appellant's bid was materially unbalanced. It bid a contingency price for CLIN 0005AC because it had concluded that it would not be necessary to obtain commercial fill. And, while its bid price for CLIN 0005AC does appear to be understated, its price for CLIN 0005AB does not appear to be significantly overstated, or even just overstated. On the contrary, appellant submitted the low bid for CLIN 0005AB. Its price was \$6.60 per cubic meter, a total of \$1,755,600; the next lowest bid was \$7.30 per cubic meter, a total of \$1,941,800. Nor has the government come forward with any evidence that appellant's bid did not result in the lowest overall cost to the government or, as it has asserted, that there was any adverse affect upon the integrity of the bidding process.

### CONCLUSION

The appeal is sustained. The matter is returned to the contracting officer to negotiate quantum.

Dated: 11 February 2004

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CAROL N. PARK-CONROY  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

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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. 54273, Appeal of Rio Construction Corporation, rendered in conformance with the Board's Charter.

Dated:

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