

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Propulsion Controls Engineering) ASBCA No. 54330
)
Under Contract No. N62799-02-C-0004)

APPEARANCE FOR THE APPELLANT: Mr. Mike Morris
General Manager

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
James D. Beback, Esq.
Counsel
Supervisor of Shipbuilding,
Conversion and Repair, Puget Sound
Bremerton, WA

OPINION BY ADMINISTRATIVE JUDGE KIENLEN
UNDER ASBCA RULE 11 AND ASBCA RULE 12.3

This dispute arose out of a contract for the internal repair and preservation of a caisson at the Puget Sound Naval Shipyard. The government has taken a unilateral deductive change, and the appellant claims additional compensation - both claims concern costs for handling hazardous waste. The appellant elected accelerated processing under ASBCA Rule 12.3. The parties have agreed to submit the case for decision on the record under ASBCA Rule 11. In accordance with the Order of 16 September 2003, we only decide entitlement. Because this appeal is decided under Rule 12.3, we only make “summary findings of fact and conclusions.” We find for the appellant.

FINDINGS OF FACT

1. On 12 March 2002 the Department of the Navy, through the Supervisor of Shipbuilding, Conversion and Repair, Puget Sound, entered into a lump-sum fixed-price contract in the amount of \$1,142,951 with the appellant, Propulsion Controls Engineering. The contract required the contractor to overhaul, in accordance with certain work items, the drydock Caisson 984. The place of performance was Puget Sound Naval Shipyard, Bremerton, WA. (R4, tab 1 at 1-3)

2. Whether or not the appellant performed work in accordance with Work Item 077-11-001 is at the heart of the dispute between the parties. Each time work items are prepared, they are customized for the particular contract and written to be applicable to the

type of vessel, the type of work involved, and the material condition of the vessel. (Gov't ex. to motion to exclude, affidavit of Christopher Archut)* Work Item 077-11-001 was apparently prepared in a standard five-paragraph format: 1 Scope, 2 References, 3 Requirements, 4 Notes, and 5 Government Furnished Materials. The Scope and References paragraphs provided:

1. SCOPE:

1.1 Title: Hazardous Waste Produced on Naval Vessels;
control [sic]

1.2 Location of Work:

1.2.1 Throughout the Vessel

1.3 Identification:

1.3.1 Not Applicable

2. REFERENCES:

a. Resource Conservation and Recovery Act (RCRA)

b. Federal Hazardous Materials Transportation Act,
49 U.S.C. §5103

c. Applicable Hazardous Waste Manifest Form
[undefined]

d. 10 U.S.C. [§]7311

(R4, tab 2)

3. The Requirements paragraph provides for the management and disposal of all hazardous waste listed therein, in accordance with the following, in relevant part:

3. REQUIREMENTS:

3.1 Manage and dispose of all hazardous waste listed in
3.5 in accordance with 2.a and 2.b.

* The government moves to exclude certain evidence. We deny the motion.

....

3.5 Hazardous waste, as identified in 2.a, expected to be produced during performance of this Job Order: [23 categories of hazardous waste are identified, but quantities are listed only for the following seven:]

TYPE	[Quantity Generated by] CONTRACTOR
Cleaning Solvents	10 GALS
Spent Abrasive Blast Material (contaminated with a known hazardous waste)	1604 LBS
Wood (contaminated with lead/lead paint/creosote)	5000 LBS
Paints (Enamel, Latex, Epoxy, thinners, oil based, rubber paint, non-skid, lacquer, remover, varnishes)	145 GALS
Paints (May include lead, cadmium, or chrome)	5 LBS
Asbestos (Valve Gaskets)	10 LBS
Rags	490 LBS

3.5.1 Provide 60,000 dollars for managing and disposing of all hazardous waste listed in 3.5. Total cost greater or less than above dollar amount will be the subject of an equitable adjustment.

3.6 Submit one legible copy of a report identifying type, amount, and disposal cost of waste listed in 3.5 that was removed during the performance of this Job Order to the SUPERVISOR. . . .

(R4, tab 2 at 3-4)

4. In the notes portion of this work item, there were several qualifications to the requirements paragraph. There were no government furnished materials. The notes, in relevant part, read:

4. NOTES:

4.1 The waste listed in 3.5 is based on the best information available at the time of preparation of the solicitation. Hazardous waste generated during the actual performance of the work may vary in type or amount from waste listed in 3.5 which may result in renegotiation for credit or increase pursuant to Paragraph (b) of 2.d. The contractor is expected to use best management practice to identify and dispose of all hazardous waste. . . .

4.1.1 The types and amounts of wastes listed in 3.5 are estimates of waste to be disposed of under this contract as required by 2.d. They are not estimates of the amount of the work involved in generating that waste. The work requirements of each individual Work Item specify the actual work to be accomplished.

4.2 Hazardous wastes are determined by one or more of the following methods:

4.2.1 Chemical analysis which shows that the material characteristics of ignitability, corrosivity, reactivity, and/or toxicity (Toxicity Characteristic Leachate Procedure – TCLP) exceed the limits for that material in 40 CFR 261.20 Subpart C.

4.2.2 Reference to a Material Safety Data Sheet (MSDS), or

4.2.3 Applying knowledge of the hazardous characteristics of the waste in light of the materials or the process used.

4.3 Asbestos, bilge water, oil/water including sludge, debris and other contaminants, sludge which includes solids and sludge from ballast tanks, CHT tanks, voids, oily waste tanks, fuel ballast tanks, fuel oil tanks, skegs (West coast), PCB's (Maryland), etc., apply only in those states listing them as hazardous waste. *When an availability is to be performed in a state where these items are hazardous waste, an estimate of the amount to be generated shall be included in 3.5. [Italics added]*

(R4, tab 2 at 4-5)

5. On 27 September 2002, the appellant submitted a request for reimbursement of excess costs for performance in accord with work item 077-11-001. The appellant included the costs of managing and disposing of 10.12 tons of creosote wood, 100 tons of spent abrasive blast, and 2 cubic yards of asbestos. The claimed increased cost was \$63,902 plus G&A of \$17,464 for a total of \$81,366. (R4, tab 30, Condition Found Report #CFR-073)

6. On 26 November 2002 the government responded and directed that the appellant:

b. Provide a detailed breakdown of management and disposal costs of hazardous wastes which you incurred during the performance period of the contract so that we can establish any equitable adjustment against the \$60,000 earmarked by 3.5.1 of Work Item 077-11-001.

c. List all non-hazardous wastes separately, with detailed breakdown of costs incurred which were not anticipated as the normal part of doing business during the performance period.

(R4, tab 32)

7. On 18 December 2002 the appellant responded to the government's directive. In its response, the appellant sought contract changes for the expenses incurred for the management of hazardous waste, which the appellant contends is "the process of monitoring, compliance, control and segregation" of hazardous waste during performance of the work. These expenses included those for the quantities of hazardous wastes set forth in 3.5.1, as well as for those that exceeded the quantities set forth in 3.5.1. The appellant summarized its costs as follows: (1) The management of waste by the subcontractor at \$103,075.80, less the \$60,000 in paragraph 3.5.1, for a total of \$43,075.80. (2) Total costs of \$19,448.66 for disposal of hazardous and non-hazardous waste that the government would not accept for disposal. (R4, tab 36)

8. On 21 January 2003, Mel Hall, the government's contract negotiator, came to the conclusion that "there has been no evidence of disposal of hazardous waste under specification Item 077-11-001." As a result, Mel Hall also concluded that because there was no evidence of disposal that "there is no obligation of the Government to pay any cost for disposal or managing of such material at this time." (R4, tab 40)

9. On 22 January 2003 the appellant responded by referencing the laboratory reports previously submitted to Doug Johnson and Mel Hall that substantiate that various waste items generated on the caisson were in fact hazardous. These reports were in the form of Waste Information Sheets (WIS), manifests from disposal sites, and receipts from

subcontractors showing that PCE actually paid for the purchase orders. They constituted substantial supporting documentation, including costs incurred for spent abrasive blast material, creosote timbers, and asbestos gaskets. (R4, tabs 41 at 2-4; gov't ex. G-1 at 3, affidavit of Richard Cranley, the Administrative Contracting Officer)

10. On 28 January 2003 the government responded to the appellant's 22 January 2003 letter. The government's response was to make a unilateral deductive change to the contract by deleting all the quantities in paragraph 3.5 of Work Item 077-11-001; and, by taking a lump sum price reduction of \$76,398, as follows:

Cost: (\$60,000.00)
G&A: (\$10,398.00) Rate: 17.33%
Fee: (\$6,000.00) Rate: 10%

(R4, tabs 42, 44)

11. On 11 February 2003 the appellant responded to the unilateral deduction taken by the contracting officer on 28 January 2003 in Modification No. A00023. This response was in the form of a certified claim. It was received by the government on or before 21 February 2003. (R4 tabs 45, 46) The government asked for more information by letter of 14 March 2003. The government asked for a response no later than 24 March 2003. (R4, tab 48) The appellant responded by letter dated 7 April 2003 (R4, tab 49). A revision to that response was dated 8 April 2003. The government received that revision on or before 15 April 2003. (R4, tab 50; compl., References t at 2, v)

12. The contracting officer denied the appellant's 11 February 2003 claim on 19 June 2003. In particular, the contracting officer concluded that the disposal of hazardous waste was addressed in numerous areas of the contract. The contracting officer concluded that paragraph 3.5 of Work Item 077-11-001 addressed only the "disposal costs incurred by the contractor in which the contractor was required to dispose of [hazardous waste] outside the boundaries of Puget Sound Naval Shipyard." (R4, tab 51 at Conclusion) The contracting officer's final decision is erroneous. The work item does not contain the language quoted.

13. With respect to asbestos waste, the contracting officer acknowledged that the appellant managed and disposed of asbestos waste, although there was disagreement as to the quantity:

The WIS listed a total of 10 pounds of asbestos waste, which matches the 10 pounds listed in Table 3.5 of Work Item 077-11-001. This contradicts PCE's contention that they disposed of 2 cubic yards of asbestos. PCE has not produced an invoice for the disposal of the 10 pounds of asbestos waste to

Rabanco Transfer Facility by PAS, accounted for in WIS 231319. If there was more than 10 pounds accounted for in the WIS, PCE has failed to produce the required WIS for the additional disposal.

(R4, tab 51 at 5)

14. On 12 September 2003, the appellant filed a notice of appeal from the contracting officer's decision. The appeal was docketed as ASBCA No. 54330. In its complaint the appellant has clarified that it seeks \$60,200 for the management and control of the spent abrasive blast material, \$38,076 for abatement services, including asbestos, and \$1,035 for the abatement of the wood containing creosote.

DECISION

In this case the contract set aside \$60,000 for the management and disposal of certain hazardous wastes specified in paragraph 3.5 of Work Item 077-11-001. The government deducted that entire amount, plus G&A and a 10 percent fee, in the sum of \$76,398 from the contract. The government took the deduction on the premise that the contractor did not do any of the management or disposal tasks set forth in Work Item 077-11-001. The government's premise was based, in part, on the conclusion that the contractor was not authorized to dispose of any hazardous waste because, under the contract only Puget Sound was authorized to dispose of hazardous waste; and, in part, on the conclusion that the contractor had failed to prove that it had managed or disposed of any hazardous waste. Further, the government's position was based in part on its definition of what is a hazardous waste within the meaning of the contract.

The appellant contends that it has managed and disposed of hazardous waste under the contract, and that some of the hazardous waste was not disposed of by Puget Sound because that waste, although designated as hazardous waste under the contract, was not hazardous waste under the laws of Washington State. Further, the appellant contends that its costs to manage and dispose of that hazardous waste exceeded the sum provided under the contract.

Work Item 077-11-001 is a specific requirement of the contract. That provision applies to the management and disposal of certain specified hazardous wastes. Because specific contract provisions take precedence over general contract provisions, the specific provisions of Work Item 077-11-001 take precedence over any provision in the contract concerning the management and disposal of hazardous wastes generally.

The government states that the appellant's theory of recovery is based on the premise that materials listed with estimated quantities in paragraph 3.5 of Work Item 077-11-001 must be treated as hazardous wastes for purposes of the contract. In its rejoinder to this

theory the government contends that the “theory is a house of cards that is blown away by the inclusion of paragraph 4.3,” which, as the government points out, provides in part that the wastes listed “apply only in those states listing them as hazardous waste.” (Gov’t br. at 8)

However, the government erroneously ignored the fact that the provision also goes on to expressly provide that when work “is to be performed in a state where these items are hazardous waste, an estimate of the amount to be generated shall be included in 3.5.”

In this case the government set forth estimated quantities of hazardous waste, for several types of hazardous waste, in paragraph 3.5 of Work Item 077-11-001. For example, the government estimated that there would be 5,000 lbs of wood contaminated with lead, lead paint, or creosote; and ten lbs of asbestos (valve gaskets). Now the government contends that these items were not hazardous waste in Washington State. We hold that, having represented those and other wastes as hazardous waste by including estimates of such waste in paragraph 3.5, the government is bound by its representation in the contract that those wastes were hazardous wastes; and, that the management and disposal costs related to those wastes would be compensated under the provisions of Work Item 077-11-001. This is true for all wastes identified by having a quantity specified in paragraph 3.5, including spent abrasive blast material, until such time as Puget Sound actually took possession of the material.

We recognize that paragraph 3.6 imposes an obligation on the appellant to submit a report identifying the type, amount, and disposal cost of waste listed in paragraph 3.5. We express no opinion concerning the quality or sufficiency of reports submitted by the appellant. Those issues relate to the issue of quantum, and quantum was not before us to decide in this decision. We do note, however, that in the circumstances of this case, each party bears its own burden of proof to the extent it seeks an equitable adjustment in the \$60,000 provided as a base amount in paragraph 3.5.1 of Work Item 077-11-001. That is, to the extent that the government claims a reduction in the \$60,000 base amount, it is the government’s burden to prove that the contractor’s costs (including overhead and profit) were less than \$60,000; on the other hand, to the extent that the contractor claims an increase in the \$60,000 base amount, it is the contractor’s burden to prove that the contractor’s costs (including overhead and profit) were greater than \$60,000.

We note that the parties seem to rely, to some extent, on documents not in the record, although those documents are supposedly part of the contract. For purposes of this decision, we have concluded that those documents were not essential to our decision or that the absence of those documents constituted a failure of proof.

CONCLUSION

The appeal is sustained as to entitlement to compensation for the management and disposal of wastes identified in paragraph 3.5 of Work Item 077-11-001. The parties are to negotiate quantum. If the parties fail to reach agreement, either party may, on motion return to this Board for resolution of the issue of quantum.

Dated: 15 March 2004

RONALD A. KIENLEN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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. 54330, Appeal of Propulsion Controls Engineering, rendered in conformance with the Board's Charter.

Dated:

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