

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Maron Construction Company, Inc.) ASBCA No. 53933
)
Under Contract No. N62472-97-C-0427)

APPEARANCE FOR THE APPELLANT: Timothy E. Heffernan, Esq.
Watt, Tieder, Hoffar & Fitzgerald, L.L.P.
McLean, VA

APPEARANCES FOR THE GOVERNMENT: Susan Raps, Esq.
Navy Chief Trial Attorney
Richard L. Spector, Esq.
Trial Attorney
Naval Facilities Engineering Command
West Coast Litigation Team
Daly City, CA

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Maron Construction Company, Inc. (Maron) appeals the denial of two claims. Its first claim is for the government's rejection of a proposed substitute for a specified proprietary item. Its second claim is for a deficient government drawing. The parties have submitted the appeal for decision under Rule 11, with stipulated facts and six documentary exhibits. On entitlement only, we deny the appeal as to the first claim and sustain the appeal as to the second.

FINDINGS OF FACT

1. On 25 March 1999, the government solicited proposals for the construction of a laboratory at Newport, Rhode Island. The solicitation required, among other things, the procurement and installation of an electrical substation. The proposed substation, referred to as Building P-030, was to be located near an existing substation, Building P-070. The existing substation had been manufactured by the Square D Company. (Joint Stipulations 2-3)

2. Although located near each other, the proposed substation and the existing substation did not physically couple. Rather the power connections into and out of the proposed substation were to be via conduit and wire (*e.g.*, are not bus, busway, or close couple cabled). There were six existing conduits for a proposed secondary feeder from

the existing station, as well as an existing 5” duct for primary cabling to the primary interrupter switch. (Joint Stipulation 4)

3. The solicitation incorporated the FAR 52.236-5 MATERIAL AND WORKMANSHIP clause which stated in relevant part:

All equipment, material and articles incorporated into the work covered by this contract shall be new and of the most suitable grade for the purpose intended, unless otherwise specifically provided in this contract. References in the specifications to equipment material, articles, or patented processes by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition. The Contractor may, at its option, use any equipment, material, article, or process that, in the judgment of the Contracting Officer, is equal to that named in the specifications, unless otherwise specifically provided in this contract.

(Joint Stipulation 6)

4. The solicitation also included the FAR 52.243-3 CHANGES clause which provided that the contracting officer may, at any time, make changes within the general scope of the contract. Pursuant to the Changes clause, if any such change causes an increase in the cost of performance, the contracting officer shall make an adjustment in the contract price and shall modify the contract. (Joint Stipulations 7-8)

5. On 26 April 1999, the government issued Amendment No. 0002 to the solicitation. This amendment included among other things the following:

PROPRIETARY ITEM

The proprietary item Square D Substation shall be used to match and mate (both physically and electrically) with the existing switchgear at building P-070. All items will need to be coordinated with Square D for compatibility.

The new substation and switchgear for building P-030 shall consist of:

[List of Square D substation components and technical requirements for those components]

NOTWITHSTANDING any other provision of the contract, no other product will be acceptable for use as a substation.

(Ex. 1)

6. On 26 May 1999, the government awarded Maron Contract No. N62472-97-C-0427 for the solicited project. Maron thereafter subcontracted with The Chappy Corporation (Chappy) for certain electrical and other work on the project including the substation. Although their bid prices were based on using the specified Square D equipment for the substation, Maron/Chappy notified the government after award that they wished to use Cutler-Hammer substation equipment. (Joint Stipulations 10-12; ex. 5 at 3)

7. On 8 November 1999, technical representatives of the government requested Chappy to obtain a statement from Cutler-Hammer confirming that the proposed Cutler-Hammer equipment would in fact be compatible, that there would be no interface/control problems within the two systems and that a warranty of all the equipment could be issued (Joint Stipulations 13-14; ex. 5 at 3). However, without waiting for Chappy's response to the technical representatives' requests, the government's project manager on 12 November 1999 notified Maron that with respect to "requesting a deviation from the acknowledged Amendment of Solicitation No. 0002 to the subject contract, your request is denied." The project manager further asserted that: "in accordance with FAR.236-5 [the Material and Workmanship clause], the Contracting Officer received special approval to use a proprietary specification in the best interest of the Government." No further explanation was provided. (Joint Stipulations 17-18)

8. Maron/Chappy promptly requested reconsideration of the government's position. On 31 January 2000, the project manager told Maron/Chappy that the government's viewpoint on the use of the Square D equipment had not changed. On 18 February 2000 and again on 19 April 2000, the government directed Maron to "comply with the proprietary item concerning the Square D equipment stated in the subject contract." (Joint Stipulations 19-20, 23) Maron/Chappy furnished the proprietary Square D equipment as directed (Joint Stipulation 24).

9. On or about 12 September 2000, Maron/Chappy discovered that a contract drawing showing that the existing space and conduit configuration were compatible with the specified Square D transformer housing was in error. Maron/Chappy submitted Request for Information (RFI) No. 44 describing the problem, proposing a solution and requesting a government reply by 19 September 2000. The government took one month to reply, and its reply did not resolve all issues. (Joint Stipulations 25-27) Given the relative simplicity of the problem, the fact that Maron/Chappy proposed a solution, and

the absence of any government explanation for its month-long delay in reply, we find that a reasonable time for a complete government reply was no more than 14 days.

10. As a result of the government delay in replying to RFI No. 44, Maron/Chappy were forced to proceed with the manufacture of the sole source equipment (which was resized to fit the allotted space) in order to meet the schedule requirements and then resolve the remaining conduit and other configuration issues in the field (Joint Stipulation 28). There is no evidence, however, that this delay caused any delay in completion of the contract.

11. On 28 December 2000, Maron submitted a certified claim under the Contract Disputes Act of 1978 for an equitable adjustment in the amount of \$186,185 for (i) the government's rejection of its proposed substitute for the Square D substation; and (ii) the government's "deficient drawing and failure to timely act on RFI # 44." (Joint Stipulations 29 and 30; ex. 5) By final decision dated 19 June 2002, the contracting officer denied the claim entirely (Joint Stipulations 31 and 32; ex. 6). Maron timely appealed this decision on 11 September 2002 (Joint Stipulation 33).

12. The government stipulates that: (i) the specification at issue is proprietary in describing the item; (ii) Maron/Chappy timely sought the Contracting Officer's approval of its proposed substitute to the item described in the specification; (iii) Maron/Chappy submitted adequate information on the proposed substitute to allow the government to determine that the substitute came within the standard of quality represented by the specification; and (iv) the proposed substitute met all salient characteristics of the Square D substation and functioned as well in all essential respects. (Joint Stipulations 35-38)

DECISION

The first sentence under the heading "PROPRIETARY ITEM" in Amendment No. 0002 to the solicitation stated: "The proprietary item Square D Substation shall be used" The last sentence under that heading stated: "NOTWITHSTANDING any other provision of the contract, no other product will be acceptable for use as a substation." *See* finding 5. Maron argues that the word "product" in this last sentence referred to any product not meeting the specified technical requirements for the Square D substation components. It further argues that, since the last sentence did not specifically state "no product other than Square D" or "no product other than the specified brand name" would be acceptable, it was insufficiently precise to prohibit a technically equal substitute.

We do not agree. In *James Reeves Contractor, Inc.*, ASBCA Nos. 32194, 33383, 87-1 BCA ¶ 19,674 at 99,593-95, we held that a proprietary specification concluding with the same language ("Notwithstanding any other provisions of this Contract, no other product will be acceptable.") was sufficient to bar a technically equal substitute.

Moreover, appellant's interpretation of the last sentence renders that sentence superfluous. Technically non-conforming substitutes were already barred by the last sentence of the Material and Workmanship clause. *See* finding 3 above.

Appellant cites no controlling precedent to the contrary. In *Monde Construction Co., Inc.*, ASBCA Nos. 44993, *et al.*, 96-2 BCA ¶ 28,400 at 141,811, 141,816, *aff'd*, 116 F.3d 1497 (Fed. Cir. 1997) (table), we held that the words "no substitutions or alternative manufacturers will be acceptable" were sufficient to bar a technically equal substitute for a specified proprietary item. We did not hold that those exact words were necessary. In *North American Construction Corp.*, ASBCA No. 47941, 96-2 BCA ¶ 28,496 at 142,298, we stated that the Material and Workmanship clause allows substitution of an equal product for a specified proprietary item "absent a warning that only the 'brand name' will be accepted." To the extent that statement requires use of the term "brand name" in a provision barring technically equal substitutes, the statement is *dicta*. *North American Construction Corp.* did not involve a proprietary specification provision barring technically equal substitutes. Neither did *Precision Metal Works, Inc.*, ASBCA No. 32815, 87-1 BCA ¶ 19,352, *Bill Strong Enterprises, Inc.*, ASBCA No. 25304, 81-1 BCA ¶ 15,125, or *WPC Enterprises, Inc. v. United States*, 323 F.2d 874 (Ct. Cl. 1963), which Maron cites in support of its proprietary item claim. *See* app. br. at 11-17; app. reply br. at 3-5. The claim is without merit.

With respect to the claim for the deficient drawing and government delay in replying to RFI No. 44, the stipulated facts are that the drawing was deficient and that as a result of the government's month-long delay in replying to the RFI, Maron/Chappy were forced by the construction schedule to procure "resized" equipment and resolve conduit issues in the field. We have further found that in the circumstances here present, a reasonable time for government reply to RFI No. 44 was no more than 14 days. *See* findings 9 and 10. Accordingly, Maron is entitled to a price adjustment under the Changes clause for any increased cost of performance caused by the deficient drawing.

The appeal is denied on entitlement as to the proprietary item claim, and sustained on entitlement as to the deficient drawing claim.

Dated: 10 March 2005

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

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. 53933, Appeal of Maron Construction Company, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals