

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Hunt Building Company, Ltd.) ASBCA No. 54245
)
Under Contract No. N62467-00-C-0416)

APPEARANCE FOR THE APPELLANT: Jonathan D. Schwartz, Jr., Esq.
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APPEARANCES FOR THE GOVERNMENT: Susan Raps, Esq.
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OPINION BY ADMINISTRATIVE JUDGE TODD

This appeal arises from the contracting officer's denial of a claim for increased costs and days of delay resulting from the government's requirements for the site boundaries for appellant's construction of certain family housing units. Appellant claims government-caused delay from the required site layout design change and the terrorist events of 9/11. Both parties have submitted the appeal for decision on the record under the Board's Rule 11. Only entitlement is before us for decision.

FINDINGS OF FACT

1. On 5 June 2001, the Navy awarded Contract No. N62467-00-C-0416 to appellant, Hunt Building Company, Ltd., for the design and construction of 157 family housing units at the Naval Construction Battalion Center (NCBC), Gulfport, Mississippi. The amount of the contract award was \$18,707,855. (R4, tab 1)

2. Section G1000, Site Preparation, in Solicitation No. N62467-00-R-0416 (the RFP) for the contract, dated 4 October 2000, provided the requirements for the contractor to develop the project site to meet the requirements of the technical specifications and performance criteria. Paragraph 1.1.b. stated in part:

New facilities shall be sited approximately at the locations indicated. See General Development Map in Part 6. All existing features that are no longer required, which interfere with the construction of the new facility, shall be demolished and removed. The swimming pool in the area near the RV park, and its associated parking is [sic] to remain.

(*Id.*, § G1000 at 1) Paragraph 1.2.a. referred to the topographic survey of the project site that was attached to Part 6 of the RFP (*id.*). Section G2000, Site Improvements, specified additional requirements for site work (*id.*, § G2000). Paragraph 1.1.2 in Section 01110, Summary of Work, specified the location of the project work as follows:

The work shall be located at the Naval Construction Battalion Center, Gulfport, Mississippi, approximately as indicated. The exact location will be shown by the Contracting Officer.

(*Id.*, § 01110 at 1) Paragraph 1.2 in Section 00102, List of Drawings, provided:

Contract drawings are as follows:

SEE PART 6

(*Id.*, § 00102)

3. Part 6, Attachments, listed six reference drawings as prints on 11 x 17 sheets in a separate electronic folder. The first drawing was the General Development Map. The five additional drawings were topographical survey maps made by Allen & Associates, Inc., professional land surveyors of Gautier, Mississippi, for five different sites. The two drawings pertinent to this appeal were:

BASEMAP.pdf

NCBC GULFPORT GENERAL
DEVELOPMENT MAP

.....

SURVEY087-0900.pdf

TOPOGRAPHICAL SURVEY –
SITE 4 - RV PARK

(*Id.*, Part 6)

4. The General Development Map included a legend for “PROJECT LOCATION” which was a pattern of crosshatches. The map showed crosshatches on

three separate sites. (*Id.*) The topographical survey drawing for Site 4 - RV Park had the legend, "Project Limits," as a dashed line which was shown around the perimeter of the surveyed area in the drawing (*id.*).

5. Site 4 - RV Park is the area at the eastern side of the General Development Map that is known as the project's Site 3. The area on the Site 4 - RV Park topographical survey drawing overlaps the corresponding site shown as the project location on the General Development Map, but also includes large areas within its Project Limits that are outside the boundaries of the site shown on the General Development Map. (*Id.*; gov't supp., tab G-3, ex. A and tab G-5, ¶ 33) The General Development Map shows Site 3 bounded by Olson Avenue, 25th Street, John Paul Jones Avenue, an access drive to the Bachelor Quarters (BOQ), specifically the rear of BOQ Building 303 (BOQ 303), a line angling southeast from the place the drive turns north to BOQ 303 to the line's intersection with a line running north/southwest of and parallel to Sylvester Drive beginning approximately in the area of the Base Commander's Quarters, then west on Sylvester turning north on John Paul Jones to Holloway Drive, and west on Holloway Drive to the point of beginning at Olson Avenue excluding the swimming pool complex and its associated parking area on the north side of Holloway Drive. The Map shows the northern boundary of Site 3 as the access drive to the rear of BOQ 303. (R4, Part 6; gov't supp., tab G-3, ¶¶ 15-16, 19-20 and ex. A) In addition to the swimming pool complex, the areas shown on the topographical survey map that are outside the boundaries of Site 3 are a large area south of Holloway Drive and an area north of the access drive to BOQ 303 and east of the line parallel to Sylvester Drive (app. supp., tab 35, ¶ 11 and ex. C).

6. The purpose of including topographical survey maps in the solicitation was to provide information concerning the current location of utilities and the topography of the sites the government had surveyed. The survey maps were more detailed than the General Development Map. (Gov't supp., tab G-2, ¶ 5)

7. Paragraph 1.14 in Section 00911, Design Submittals, required design submittals at approximately 20 percent, 50 percent, and 100 percent levels of progress for review and comment by the contracting officer (*id.*, § 00911, p. 7). Paragraph 1.14.4 specified in relevant part:

Final Design

Contracting Officer review or acceptance of the final design shall not be construed as a waiver from design/build requirements expressed within this document where those requirements may have been erroneously expressed or omitted from the Contractor prepared design documents

unless such variations have been specifically noted by the Contractor and accepted in writing by the Contracting Officer. The accepted final design shall be incorporated into the contract.

(*Id.* at 8)

8. The solicitation included the following statement in an Order of Precedence clause:

Acceptance of the proposal documents in making the contract award shall not be construed as a waiver to [sic] the RFP requirements.

(*Id.*, § 00911 at 2, ¶ 1.7)

9. The contract incorporated by reference the standard contract clauses at FAR 52.243-4, CHANGES (AUG 1987); DFARS 252.236-7001, CONTRACT DRAWINGS, MAPS, AND SPECIFICATIONS (AUG 2000) which provides in relevant part that “[l]arge-scale drawings shall govern small-scale drawings;” and FAR 52.233-1, DISPUTES (DEC 1998) (*id.*, § 00700).

10. Mr. Tom Sinton, appellant’s executive vice president, developed the design concept for the project with Spectrum Land Planning, Inc. (Spectrum). On 4 February 2001, he emailed pre-proposal conference questions to the government. Appellant asked for clarification of the General Development Map because the RFP referred to five sites and the crosshatching on the drawing showed only three sites. Appellant also asked the following about the Site 4 - RV Park topographical survey map:

This drawing indicates that the project limits extend south of Holloway Drive. Yet the cross hatching shown on the General Development Plan indicates Holloway Drive as the southerly limit of the site. Please clarify the project limits. Is John Paul Jones Avenue between Sylvester Drive and 25th Street required to remain?

(App. supp., tab 34, ex. A at 6)

11. On 6 February 2001, the government held a pre-proposal conference at NCBC that Mr. Sinton and Mr. William Fowler, president of Spectrum, attended on behalf of appellant. The government representatives included Ms. Charlene Kreeger, the contracting officer; Mr. Jerry Davis, the government’s construction manager for the project; Mr. Bernie Walker, public works engineer at NCBC and local engineer in charge

of the project; others representing the government; and representatives of other interested bidders. (App. supp., tab 34; gov't supp., tab G-3, ¶¶ 1, 3 and tab G-4, ¶ 4) Mr. Sinton noticed that there were no boundary markers when they visited Site 3, and he did not recall any instructions or diagrams from the government regarding the site boundaries (app. supp., tab 34, ¶¶ 9-10). Mr. Fowler's notes of the conference reflect that the bidders were instructed not to locate units south of Holloway Drive and that a question was raised about the use of vacant land for development in Site 3. There is no reference to a requirement to stay south of the access road to BOQ 303 in the notes, and he did not recall discussion of that site boundary. (App. supp., tab 36, ¶¶ 7-8 and ex. A)

12. When a question arose during the pre-proposal conference about the project limits in the vicinity of the access road to BOQ 303, Mr. Davis referred to the General Development Map and drew a sketch of the area on a marker board for the attendees to see. Mr. Davis told the potential bidders that the access road was outside the border of construction to the project, but the government would be willing to consider any feasible proposal to relocate the road. Mr. Walker remembered Mr. Davis drawing the diagram of the project limits and believed he told potential bidders to stay south of the access road to the BOQ in their development plans (gov't supp., tab G-3, ¶¶ 32, 34 and G-4, ¶¶ 18-21). We find the government testimony, as corroborated, more reliable than appellant's witnesses' lack of recollection of discussions at the pre-proposal conference to establish that appellant was advised of the location of the north boundary of Site 3.

13. On 14 February 2001, the government responded to appellant's pre-proposal conference questions. With respect to the General Development Map, the government stated that two sites were dropped from the project, and "[t]he cross-hatching shows the areas that remain." The government's response to appellant's question about Site 3 was, in relevant part:

Development is restricted to the area north of Holloway Drive. Neither John Paul Jones Drive nor 25th Street is required to remain, as long as the design maintains adequate circulation around the new housing areas.

(App. supp., tab 34, ex. B at 11)

14. Amendment No. 0003, dated 14 February 2001, to the RFP confirmed that no work was to be performed south of Holloway Drive in the following statement:

At G2000

GENERAL: At the pre-proposal conference held February 6, 2001, there were discussions held concerning the possibility

of additional site development to the south of Hollaway [sic] Drive. The decision is that no work is to be performed south of Hollaway [sic] Drive on this contract and the original RFP requirements remain unchanged, except as otherwise amended.

(R4, tab 1, Am. No. 0003 at 9 of 15) Amendment No. 0006, dated 21 March 2001, to the RFP stated certain questions of general interest that had been asked with responses provided for clarification of the RFP. The following relevant exchange was included:

Question #1: “In an effort to maximize the neighborhood feel of the new housing units, and to avoid interference with existing utilities, is it permissible to encroach on adjacent vacant or unused property at the east site, so long as it does not interfere with expansion of the RC [sic] park, the recreation area south of Hollaway Drive or the BEQ [sic] at the north-east of the property?”

Response: Yes, *as long as the Base has access to Building 303 (BOQ), Building 185 (Sanitary Lift Station), and Holloway Drive does not dead-end.*

(*Id.*, Am. No. 0006 at 5; emphasis added)

15. On 9 April 2001, appellant submitted its proposal, including drawing P-2 showing the distribution of housing units at Site 3, to the government. Drawing P-2 did not show the existing access road to BOQ 303 or any of the buildings to the north of the Site 3 boundary shown on the General Development Map. The design allowed for access to the BOQ area. Appellant’s proposal appeared to conform to the General Development Map because of the omission of the BOQ 303 access road from Drawing P-2. The inclusion of the existing Lift Station on Drawing P-2, if compared to its location on the Site 4 - RV Park drawing, can suggest that appellant’s drawing proposed housing where the access road was on the General Development Map. Appellant did not discuss in its proposal or specifically note on its Drawing P-2 that its design would impede access to the BOQ on the existing right-of-way or that appellant planned to relocate the access road. (R4, tab 5; app. supp., tab 23 at 26-37, tab 24 at 10, tab 34, ¶¶ 13-14, tab 35, ¶¶ 9-10, and tab 37, ¶ 10; gov’t supp., tab G-3, ¶¶ 39, 50-51)

16. Appellant relied on the Site 4 - RV Park drawing for the project limits because it was a larger scale drawing that provided more detail than the General Development Map. From responses to its specific requests for clarification of the project limits, it understood that access to the BOQ was required, but not the existing vehicular access to

the rear of the BOQ. Appellant also relied on the fact that bidders were advised that John Paul Jones Drive and 25th Street were not required to remain. Since no information was provided about requiring the access road to the BOQ to remain, appellant assumed that it was also not required to remain. (App. supp., tab 34, ¶¶ 12, 13, tab 35, ¶¶ 8-9, tab 36, ¶¶ 9-10, and tab 37, ¶ 10)

17. In reviewing appellant's proposal, the government did not anticipate a problem with site boundaries because of a belief that the access road to the BOQ was clearly shown on the General Development Map as the project limit. The government representatives thought that appellant's design on drawing P-2 matched the crosshatches on the General Development Map. (App. supp., tab 23 at 31)

18. After contract award, on 28 June 2001, appellant and government representatives attended a pre-design conference held at NCBC. The government made clear that the road to the rear of BOQ 303 needed to be kept open during construction. The government also advised that permanent access was required, but the road could be moved. Appellant indicated it might have to relocate the road. (App. supp., tab 37, ex. A; gov't supp., tab G-4, ex. A at 3)

19. Appellant's 20% Design Submittal included site Drawing SP-2, dated 27 July 2001 (R4, tab 6).

20. On 2 August 2001, appellant had the project site surveyed by Knesal Engineering Services, Inc. of Gulfport, Mississippi on the basis of an electronic file from Spectrum which contained the Site 4 - RV Park topographical drawing showing the dashed line identified as the "Project Limits" that was in the RFP. Spectrum requested that Knesal place stakes for construction along the "Project Limits" boundary shown on that drawing. On 2 August 2001, Knesal staked the points for Site 3 as requested. (App. supp., tab 37, ¶ 11 and tab 38, ¶¶ 5-7 and ex. A)

21. On 15 August 2001, Spectrum sent Mr. Robert Harris, appellant's design manager, an email message with two revised site drawings identified as SP-2 (app. supp., tab 37, ¶ 6; gov't supp., tab G-4, ex. C). They showed "proposed alignment for the new access drive for the BOQ" (gov't supp., tab G-4, ex. C at 1). Mr. Harris sent the drawings to Mr. Davis the following day as "a couple of scenarios on the Site 3 – BOQ Service Drive issue" for discussion at the meeting scheduled for the following week (*id.*). Mr. Davis forwarded the email to Mr. Walker, who reviewed the material and expressed his concern that the proposed realigned access road would interfere with a gas line along the existing access road and be located too close to the BOQ (gov't supp., tab G-3, ¶¶ 44-45, 47). Mr. Walker's comments on the 20% design submittal, dated 20 August 2001, included the following comment 12. on drawing SP-2:

Existing drive to BOQ. Discuss routing and how it will impact the gas main in the area.

(*id.*, tab G-4, ex. D at 1)

22. The parties met on 21 August 2001, to review appellant's 20% design submittal. During the lunch break, Messrs. Davis and Walker visited the BOQ area with a representative of Spectrum and discovered a survey stake that was very close to the BOQ. It was well beyond the General Development Map project limits, north of the access road. The survey stake showed the government representatives that appellant's proposed site development would place housing units next to the BOQ and within the right-of-way of the existing access road. The placement was not within the government's planned Site 3 project location. (App. supp., tab 35, ¶ 13; app. rebuttal, tab A-2, ¶ 5; gov't supp., tab G-3, ¶¶ 48, 49 and tab G-4, ¶¶ 65-68) The government told appellant that it wanted appellant to move the housing units farther away from the BOQ (app. supp., tab 36, ¶ 12). The government discussed the allocation of additional land for the project so that the housing units would also be farther away from the Base Commander's Quarters on the east (app. supp., tab 35, ¶ 13, tab 36, ¶ 12).

23. The government worked with appellant to resolve the design problem. On 29 August 2001, appellant emailed to Mr. Davis a revised layout concept that relocated the housing units that were near the BOQ and the Base Commander's Quarters. In a telephone conversation on 31 August 2001, Mr. Sinton informed Mr. Davis that there would be added costs associated with the revised site plan, and appellant would work with the government to try to minimize the cost. The government allocated additional acreage to provide sufficient room to accommodate the units in appellant's proposed revised layout. (R4, tabs 9-14; app. supp., tab 34, ¶ 18 and tab 36, ¶ 12; gov't supp., tab G-4, ¶¶ 71, 74)

24. On 14 September 2001, the government notified appellant that its proposed revised Site 3 layout was acceptable (R4, tab 11; app. supp., tab 34, ¶ 20).

25. Appellant entered into a "gentleman's agreement" that if the government was requiring the contractor to exceed the requirements of the RFP, as amended, due compensation would be required. The agreement was made in a telephone conversation between Mr. Sinton and Mr. Davis that was later memorialized. (App. supp., tab 22 at 39-41 and tab 34, ¶ 18) On 17 September 2001, Mr. Harris sent an email to Mr. Davis advising the government that appellant was in the process of obtaining a survey for its new layout at Site 3. The email stated:

One issue that we need to address is that there is more paving and utility work associated with the new layout, this will

involve more cost than was anticipated in our proposal. As you are aware we were very tight and items were deleted to get the project within budget. We will certainly work with you to minimize the impact but we would like to have acknowledgment that there are additional costs involved.

(R4, tab 13) Mr. Sinton followed up by email to Mr. Harris on the same date that stated in pertinent part:

We have a gentleman's agreement to work together for an equitable adjustment; even if it winds up being nothing.

(Id.)

26. On 21 February 2002, the government accepted appellant's final design for the project and incorporated it into the contract. The letter stated that acceptance was not to be construed as a waiver from the RFP requirements where those requirements may have been erroneously expressed or omitted from the contractor's prepared design documents unless such variations were specifically noted by the contractor and accepted in writing by the contracting officer. The letter constituted appellant's notice to proceed. (R4, tab 15).

27. On 10 May 2002, appellant submitted a request for equitable adjustment (REA) in the amount of \$231,279 for increased costs resulting from changing the project limits for construction after award of the contract and a contract time extension of 85 additional days for the delayed government approval of appellant's final design (R4, tab 16). By letter dated 23 May 2002, the contracting officer denied the REA on the grounds that the government provided design review comments to appellant that were not a change order and appellant's request was not timely (R4, tab 17).

28. On 15 January 2003, appellant revised its REA stating the total costs as \$221,824 and requesting a contract time extension of 79 days (R4, tab 18). Later that day appellant revised its letter to certify a claim for \$231,279 and a time extension of 79 days and to request a contracting officer's final decision (R4, tab 19). The government responded on 30 January 2003 with a request for a clear statement of the requested equitable adjustment and a reasonable breakdown of the claimed costs (R4, tab 20). By letter dated 30 January 2003, appellant submitted detailed supporting cost data for a claim of \$221,824 (R4, tab 21). The contracting officer's final decision, 16 June 2003, denied the claim in its entirety on the grounds that appellant was responsible for designing the project within the boundaries indicated in the RFP and the northern boundary of the project was clearly established prior to award (R4, tab 24). Appellant filed this timely appeal.

DECISION

Appellant argues that only its interpretation of the contract gives reasonable meaning to the RFP, the amendments to the RFP, and the government's pre-proposal clarifications. Appellant has several reasons for maintaining that the Site 3 boundaries were established by the Site 4 - RV Park drawing, not the General Development Map: the General Development Map was provided as a guide indicating only approximate locations for the work site; the small scale of the Map did not provide sufficient detail to plan the design concept; the Map did not contain a designation of Project Limits that indicated construction was required to be confined to the area labeled "project location;" the government's response to appellant's request for clarification of the term "Project Limits" left the design up to the contractor, provided development was only restricted to the area north of Holloway Drive; the contract terms provide that large-scale drawings, *i.e.*, the Site 4 - RV Park drawing, shall govern small-scale drawings, *i.e.*, the General Development Map; the government failed to make clear its "undisclosed intent" (app. br. at 21) to have the crosshatching on the Map represent the Project Limits in response to appellant's proposal questions; and the government's responses and RFP amendments concerning Holloway Drive, using property at the east site, and maintaining access to the BOQ were consistent with the Project Limits on the Site 4 - RV Park drawing and did not call for additional clarification. Appellant maintains that it was more logical to rely on the Site 4 - RV Park drawing for the site boundaries than the General Development Map.

The government relies on the plain and unambiguous language of the contract reference to the General Development Map for the locations of new facilities and the Map's legend and crosshatching that identified "PROJECT LOCATION." Since there were discrepancies between the Map and the Site 4 - RV Park drawing, the government argues that a contractor's reliance on the "project limits" on the topographic survey drawing as controlling the location of the facilities was unreasonable. Any arguable ambiguity on the limits of Site 3 was patent, and appellant never specifically asked whether the access road to BOQ 303 was within the limits of Site 3.

Contract interpretation begins "with the language of the written agreement." *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004). The plain and unambiguous meaning of a written agreement controls. *Hercules Inc. v. United States*, 292 F.3d 1378, 1380-81 (Fed. Cir. 2002). We must interpret the contract in a manner that gives meaning to all of its provisions and makes sense. *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953, 958 (Fed. Cir. 1993). The reference in Section G1000 of the contract specifications to the General Development Map for the locations of the sites of new facilities and the Map's legend and crosshatching identifying "PROJECT LOCATION" are plain and unambiguous. The topographical survey drawings were included as contract drawings, but the specifications did not call them out for location of the project. In the absence of direction to the contractor, they were no

more than information about the topography of the project sites (finding 6). The term “project limits” on those drawings was only used to outline what was shown on each of the five areas surveyed, which were not all project locations (findings 3, 4).

Assuming *arguendo* that an interpretation that the “project limits” on the Site 4 - RV Park drawing created the site boundary for appellant’s design was reasonable, the contract contained an ambiguity. A patent ambiguity is present when the contract contains facially inconsistent provisions that would place a reasonable contractor on notice and prompt the contractor to rectify the inconsistency by inquiring of the appropriate parties. *Stratos Mobile Networks USA, LLC v. United States*, 213 F.3d 1375, 1381 (Fed. Cir. 2000). Any arguable ambiguity created by the topographical survey drawings’ references to project limits was not resolved by the provision that they would govern the smaller scale General Development Map because the specifications directed bidders to the General Development Map for the project location.

Appellant was aware of the differences between the two drawings and requested clarification as to what the project limits were. The government’s responses addressed what it considered raised appellant’s inquiry, as determined by appellant’s specific questions. A contractor must inquire and seek clarification on the proper contract interpretation of a patent ambiguity or run the risk of an interpretation adverse to its own. *Community Heating & Plumbing Co., Inc. v. Kelso*, 987 F.2d 1575, 1579-80 (Fed. Cir. 1993); *All Star/SAB Pacific, J.V.*, ASBCA No. 50856, 99-1 BCA ¶ 30,214 at 149,480. Appellant never specifically asked whether the access road to BOQ 303 was within the limits of the project at Site 3. Its failure to make the proper inquiry precludes acceptance of its interpretation that the project limits were on the Site 4 - RV Park drawing.

Appellant’s assertion that the government’s allocation of additional acreage for accommodating correction of appellant’s design was a compensable change is without merit. The revised site plan was required as a result of appellant’s failure to conform to the boundaries on the General Development Map, which would have allowed the desired vehicular access to the BOQ. We are not persuaded that appellant’s relocation of houses close to the Base Commander’s Quarters was a change directed by the government (finding 23).

To recover on a claim of delay, the contractor must show the extent of the claimed delay, that the delay was proximately caused by the government, and that the delay harmed the contractor. *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994); *M.A. Mortenson Company*, ASBCA No. 53229, 05-1 BCA ¶ 32,837. Appellant has claimed a contract time extension of 79 days, but failed to submit evidence that the government was responsible for any delays in obtaining final approval of its site design or that it is entitled to recovery for the impact of the terrorist events of 11 September 2001 and the subsequent increased security measures taken by the government.

For these reasons, the appeal is denied.

Dated: 15 June 2005

LISA ANDERSON TODD
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. 54245, Appeal of Hunt Building Company, Ltd., rendered in conformance with the Board's Charter.

Dated:

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