

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
ECI Construction, Inc.) ASBCA No. 54344
)
Under Contract No. DACA41-02-C-0010)

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OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON THE GOVERNMENT’S MOTION FOR SUMMARY JUDGMENT

This appeal arises out of Contract No. DACA41-02-C-0010 for the design and construction of the Add/Alter Fitness Center, PRQE 045100, at McConnell Air Force Base in Wichita, Kansas. Appellant ECI Construction, Inc. (ECI) seeks \$64,829.44 on behalf of itself and its design subcontractor, TapanAm Associates (TapanAm). At issue is the government’s motion for summary judgment. We grant the motion.

FINDINGS OF FACT

On 26 June 2002, the government issued a request for proposal (RFP) for the design and construction of a 2,266 square meter addition and a 2,570 square meter alteration/renovation to the fitness center. As originally issued, the RFP contained a proposal schedule that consisted of four “BASE SCHEDULE” line items (Item Nos. 0001-0004), and five “OPTION SCHEDULE” line items (Item Nos. 0005-0009). Item No. 0001 in the Base Schedule covered:

All design activities to include new additions (gymnasium, free weights, resistance weights, cardiovascular, and HAWC area), renovation areas (locker rooms, admin area, existing gymnasium, small exercise room, and corridor carpeting), all site work (grading, landscaping and force protection) and

comprehensive interior design. As-built Drawings, O&M Manuals, and User Training.

Item No. 0002 covered: “All site work (includes seeding, mechanical areas, landscaping, paving, grading, sidewalks, and drainage).” Item No. 0003 covered: “All new additions (including corridors, new gymnasium, equipment/weight room, HAWC and mechanical Mezzanine).” A fixed price of \$50,000.00 was provided by the government for Item No. 0004, “As-built drawings, O&M manuals, and User Training.” (R4, tab 6 at 00010-1, 10010-3 to -4)

In the Option Schedule, Item No. 0005 covered “New men’s and women’s restroom (includes fixtures, plumbing, finishes, and partitions). (OPTION 1);” Item No. 0006 covered “Renovate existing weight room into women’s locker room. (OPTION 2);” Item No. 0007 covered “Renovate existing gymnasium. (OPTION 3);” Item No. 0008 covered “Renovate existing men’s, women’s and DV locker room into men’s and women’s DV locker rooms and men’s locker room. (OPTION 4);” and Item No. 0009 covered “Renovate existing HAWC and admin area into admin and small exercise area. Replace corridor carpeting. (OPTION 5).” (R4, tab 6 at 00010-3 to -4)

Mr. Edgar Ray, Jr., the government project manager who wrote the RFP, intended for “all the design activities” to include new construction, renovation areas, site work and comprehensive interior design. The option work was included in the design activities. (Supp. R4, tab 25, Ray dep. at 40-41) Amendment No. 0002 to the RFP’s original proposal schedule combined the first three items in the Base Schedule into Item No. 0001 and simply renumbered the remaining Base Schedule and Option Schedule items in sequence as Item Nos. 0002 through 0007 (R4, tab 4 at 00010-3 to -4) The changes were made at the request of the Air Mobility Command (supp. R4, tab 25, Ray dep. at 17-19). Thereafter, Item No. 0001 provided as follows:

All design activities to include new additions (gymnasium, free weights, resistance weights, cardiovascular, and HAWC area), renovation areas (locker rooms, admin area, existing gymnasium, small exercise room, and corridor carpeting), all site work (grading, landscaping and force protection) and comprehensive interior design. All site work (includes seeding, mechanical areas, landscaping, paving, grading, sidewalks, and drainage). All new additions (including corridors, new gymnasium, equipment/weight room, HAWC and mechanical Mezzanine).

(R4, tab 4 at 00010-3)

ECI's bid was prepared by Mr. Scott Creel, the company's lead estimator and purchasing manager (supp. R4, tab 23, Creel dep. at 24). Mr. Creel understood the words "all design activities" to mean the base bid new construction items only, and not the option renovation items (*id.* at 26-27, 34). He ignored the references to "renovation areas" in Item No. 0001 because in his mind it was option work and made more sense with the option items. He thought the description was unambiguous and "[v]ery clear." (*Id.* at 35-38) He thought it was obvious that design money should not be bid for optional work, and had never bid it that way (*id.* at 32). Mr. Creel did not seek clarification of the requirements from the government (*id.* at 21).

TapanAm's original proposal for its design services was sent to Mr. Creel from Mr. Robert Graverholt. The proposal was a lump sum price, including options. (Supp. R4, tab 24, Graverholt dep. at 12-14) Mr. Creel, however, asked ECI's project manager, Ms. Krista Scott, to call TapanAm and ask them to break out their numbers for the base bid and options. Ms. Scott agreed with Mr. Creel's reading of the proposal schedule. (App. resp., ex. A, Scott dep. at 5, 13-17) Mr. Graverholt provided the information requested by Ms. Scott without consulting the proposal schedule (supp. R4, tab 24, Graverholt dep. at 15-17).

Mr. Eric Bretzel, ECI's CEO, signed the Standard Form 1442 submitted as ECI's offer before Mr. Creel had finished assembling the bid (supp. R4, tab 27, Bretzel dep. at 11). He did not discuss the language of the proposal schedule with Mr. Creel, or anyone else, before ECI's bid was submitted (*id.* at 13).

Contract No. DACA41-02-C-0010 in the amount of \$4,687,274.00 was awarded to ECI on 30 August 2002, for Base Schedule Item Nos. 0001 and 0002 and Option 1 Item No. 0003 (R4, tab 4). Notice to proceed was issued on 17 September 2002 (R4, tab 5).

The contract schedule was set forth in the contract's special clauses. Pursuant to FAR 52.211-10, COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK (APR 1984), the contract work was divided into three phases with sequential commencement times and durations. Phase I included "Base Bid (Design and Construction) plus Option 1," Phase II was defined as "Construction of Phase II: Option 2 and Option 3," and Phase III was "Construction of Phase III: Option 4 and Option 5." (R4, tab 6 at 00800-2)

Additionally, the contract included the standard FAR construction clauses, including FAR 52.233-1, DISPUTES (DEC 1998) (incorporated by reference) and FAR 52.215-1, INSTRUCTIONS TO OFFERORS - COMPETITIVE ACQUISITION (MAY 2001) (R4, tab 6 at 00100-2, 00700-2).

A predesign conference was held on 7 October 2002, and attended by representatives of the government, ECI and TapanAm. The project manager's notes, contained in a memorandum dated 21 October 2002, state the following:

The RFP design requirements were reviewed during the meeting. The RFP requires the complete design regardless whether an option was awarded.

(R4, tab 13, ¶ 3)

A design review conference was held on 3 December 2002. Architect review comments prepared by the government contain the following design comment to TapanAm: "Refer to RFP 'Base Bid Item No. 0001, page 00010-3.' Full design for all options is required . . ." (R4, tab 9). By a letter dated 12 December 2002, ECI requested that this comment be withdrawn because it disagreed that "Base Bid Item No. 0001 includes the design costs for the options listed in the option schedule" (R4, tab 14).

Mr. Robert O. Avery, the administrative contracting officer (ACO), responded in a letter dated 16 December 2002, informing ECI that Base Bid Item No. 0001 of the Base Schedule included all design activities. The letter stated:

. . . [A]s emphasized during the Pre-design Conference on October 7, 2002, the proposal schedule on Page 3 of Section 00010 in the RFP, under Item 0001 of the Base Schedule requires that "All design activities to include new additions (gymnasium, free weights, resistance weights, cardio-vascular, and HAWC area), renovation areas (locker rooms, admin area, existing gymnasium, small exercise room, and corridor carpeting). . . and comprehensive interior design" be included in this item.

In light of the above, and of the award to your firm of Base Bid Item 0001, there is no change in the Government position that design for all items is required by the contract regardless of whether any/all options presented in the RFP are awarded. Accordingly, your request for withdrawal of the design review comment that reiterates this contract requirement is denied.

(R4, tab 15)

By letter dated 8 January 2003, ECI replied to the ACO's letter, asserting that "the content of Base Bid Item #0001[on the proposal schedule . . . is ambiguous at best" (R4, tab 16). ECI's letter informed the ACO that TapanAm also did not interpret the bid schedule to require design for options in the base bid line item, stating:

The concurrence between ECI Construction Inc and TapanAm Associates reflects that the responsibility of any alternate interpretation of this Bid Item should be the responsibility of the drafter of the RFP.

(Id.)

The ACO disagreed in a letter dated 16 January 2003, which informed ECI that he could find no contractual basis for ECI's position. He concluded:

. . . You are responsible for complete design of all work described by the contract and for submission in accordance with the design schedule provided by the contract.

(R4, tab 17)

By letter dated 22 May 2003, ECI submitted its claim and requested a final decision from the contracting officer. The letter stated:

ECI Construction Inc (the Contractor) and TapanAm Associates Inc (the Designer) followed the bid form literally and included the design fees for the option items with each option. The base bid contained the design and construction of the new addition and associated site improvements. We were later directed to design the option items as part of the base bid cost since the options were not awarded under this contract. As a result of this direction ECI Construction and TapanAm Associates incurred an additional cost of \$64,829.44.

The only description of the Bid Items are on the proposal schedule. There is no language directing the reader to separate the design fee from the construction cost of each bid item and include it with the base bid. As this is counter intuitive, specific language is necessary. Even if, as the Area Office claims, there is another interpretation, then it is simply ambiguous. ECI cannot be fiscally liable for ambiguous or deficient language.

(R4, tab 9)

On 30 May 2003, ECI sent the government a letter deferring its request for a final decision for sixty days “[i]n order to give the district ample time to review our request and provide the framework for equitable resolution,” and submitted additional support for its claim (R4, tab 10).

On 8 August 2003, ECI renewed its request for a contracting officer’s final decision (R4, tab 11). A final decision was issued on 19 September 2003, wherein the contracting officer stated, among other things:

. . . The Government’s finding is that the Contract required “All design” under Base Line Item No. 0001. The language “All design”, given its ordinary meaning, is clear and is not subject to any other reasonable interpretation. Simply put “all” means “all” not something less than all. There is nothing in the Contract that conflicts with that ordinary meaning or requirement. There is no ambiguity in that the only design requirement mentioned is in Base Line Item No. 0001.

(R4, tab 1 at 6)

ECI filed its notice of appeal on 24 September 2003.

DISCUSSION

In moving for summary judgment, the government must demonstrate that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one that may make a difference in the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

To survive the government’s motion for summary judgment, appellant must come forward with specific facts showing there is a genuine issue for trial and what specific evidence could be offered at trial. “Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986). Appellant must present evidence that is more than supposition, and not rely on mere allegations and denials in the pleadings. *Anderson, supra*, 477 U.S. at 249-50.

Although the parties here differ about the conclusions to be drawn from the facts, we are satisfied that there is there is no genuine dispute concerning them. Nor do we find a relevant evidentiary conflict in the record. *See Barmag Barmer Maschinenfabrik AG v. Murata Machinery, Ltd.*, 731 F.2d 831, 835-36 (Fed. Cir. 1984). Instead, the parties' disagreement relates to their respective interpretations of the contract proposal schedule, a legal issue that may properly be resolved by summary judgment. *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984); *TRW, Inc.*, ASBCA No. 51172, 02-2 BCA ¶ 31,919 at 157,720; *Motorola, Inc.*, ASBCA No. 51789, 01-1 BCA ¶ 31,233 at 154,152.

The government asserts that the contract language is clear and unambiguous, that ECI was required to design all construction listed under Base Schedule Item No. 0001, and that appellant's interpretation is unreasonable (gov't mot. at 5). ECI responds that the schedule can only be interpreted one way; specifically, that Base Schedule Item No. 0001 did not include design activities for renovation items listed as options. It further contends that, to read the schedule as the government does, "renders the Bid Schedule latently ambiguous." (App. opp'n at 1)

Elementary principles of contract interpretation require that the contract be read as a harmonious whole, if possible, and that all provisions be given effect and none rendered "useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous." *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965); *United Pacific Insurance Co. v. United States*, 497 F.2d 1402, 1405 (Ct. Cl. 1974); *Central Mechanical, Inc.*, ASBCA Nos. 26543, 26584, 85-1 BCA ¶ 17,711 at 88,392. Further, a contract will be found to be ambiguous if it is susceptible to more than one reasonable interpretation, each of which is consistent with the contract language and the other provisions of the contract. *See Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997). It is not enough that the parties differ in their respective interpretations of a contract term; rather, both interpretations must fall within a "zone of reasonableness." *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 751 (Fed. Cir. 1999); *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1578 (Fed. Cir. 1993); *WPC Enterprises, Inc. v. United States*, 323 F.2d 874, 876 (Ct. Cl. 1963).

Here, the Base Schedule Item No. 0001 states: "[a]ll design activities to include" and then goes on to enumerate "new additions," "renovation areas," "all site work," and "comprehensive interior design." The word "all" is to be given a "broad and expansive meaning." *Sunexport*, ASBCA No. 14163, 72-1 BCA ¶ 9381 at 43,561. As stated in *National Steel & Shipbuilding Co. v. United States*, 419 F.2d 863, 875 (Ct. Cl. 1969): "'All' means the whole of that which it defines – not less than the entirety. 'All' means all and not substantially all. The prefatory word 'all' in the [proposal schedule] meant, then, that no available effort might be omitted."

Further, there is no reference to any “design” work in any of the five options listed in the Option Schedule. Instead, each of the options simply describes the renovation work to be performed. Finally, the Commencement, Prosecution and Completion of Work clause, FAR 52.211-10, provided that the project work would be divided into three phases. Phase I included “Base Bid (Design and Construction) plus Option I.” No design work was specified in either Phase II or Phase III, both of which were comprised only of optional work.

Accordingly, we are satisfied that ECI’s interpretation of the contract violates the rules of contract interpretation and is not within the zone of reasonableness because it is inconsistent with FAR 52.211-10 and makes the words “[a]ll design activities” in the bid schedule meaningless. Indeed, Mr. Creel, who prepared ECI’s proposal, ignored the references to “renovation areas” in Item No. 0001 because in his mind it was option work and made more sense with the option items. This was just his opinion and he bid the contract to conform to his own perception of how he thought the bid schedule should have been written. ECI’s reliance upon *Fry Communications, Inc. v. United States*, 22 Cl. Ct. 497 (1991) is, therefore, misplaced.

Even if we were to somehow find ECI’s reading of the bid schedule to be reasonable and conclude that the contract was ambiguous, we would conclude that the ambiguity was patent and raised a duty to inquire. *See Triax Pacific, Inc. v. West*, 130 F.3d 1469, 1474-75 (Fed. Cir. 1997). Although Mr. Creel thought the contract requirements were “very clear,” he could only reach that conclusion either by ignoring the reference to “renovation areas” in Item No. 0001 or by assuming that it related only to the option items. When we do the same, the reference to “renovation areas” creates an ambiguity so glaring as to impose a duty upon ECI to inquire about the government’s intentions prior to submitting its bid. *See Centex Construction Co.*, ASBCA Nos. 51906, 51908, 03-2 BCA ¶ 32,379 at 160,227. Because ECI made no such inquiry, the ambiguity must be resolved against it. *See Triax Pacific, supra*.

CONCLUSION

The government’s motion for summary judgment is granted, and the appeal is denied.

Dated: 11 January 2005

CAROL N. PARK-CONROY
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. 54344, Appeal of ECI Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

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