

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Johnson Controls-Hill L.L.C.) ASBCA No. 54958
)
Under Contract No. N62467-00-D-2451)

APPEARANCE FOR THE APPELLANT: William K. Mahn, Esq.
Alexandria, VA

APPEARANCES FOR THE GOVERNMENT: Susan Raps, Esq.
Navy Chief Trial Attorney
John McMunn, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TODD
PURSUANT TO BOARD RULE 12.3

This appeal involves a question of contract interpretation concerning the ordering of painting under a firm fixed-price, indefinite quantity contract for family housing maintenance. Appellant has elected the Board's Rule 12.3 procedure for an accelerated appeal.

FINDINGS OF FACT

1. On 28 June 2000, the Navy awarded Contract No. N62467-00-D-2451 for Regional Base Operating Support to appellant Johnson Controls-Hill L.L.C. The contract contained a firm fixed-price portion (FFP) and an indefinite quantity (IQ) portion. The contract was awarded for a base year beginning 1 October 2000, with an option to extend the term for successive one-year terms not to exceed a total of ten years. The work was to be performed at the Naval Air Station, Jacksonville; the Naval Station, Mayport; and outlying areas in Florida. Annex 6 in the contract included requirements for maintenance and painting of family housing units. (R4, tab 2 at 1-2, I-5-I-6, C-3, C6-1 *et seq.*)

2. Solicitation No. N62467-00-R-2451, dated 10 September 1999, which contained the contract terms and conditions, described the work relevant to this appeal in the following provision:

6.1.1 ANNEX DESCRIPTION. This annex identifies the routine day to day operations and miscellaneous services required for maintenance services for family housing. . . . Table 6-1 describes the facilities to be maintained. Work

includes the performance of Service Calls, Preventive Maintenance (PM), Change of Occupancy Maintenance (COM), Custodial Service, painting, and other services as described herein.

(R4, tab 2 at C6-3)

3. The schedule of services contained contract line items (CLINs) for pricing, among other items, IQ COM at Mayport (CLIN 1016CE), IQ paint at Mayport (CLIN 1016CF), and IQ COM at Jacksonville (CLIN 1016AE) (*id.* at 31-32, 34-35). There was no CLIN for IQ paint at Jacksonville (tr. 40).

4. Paragraph 6.1.5 states that the requirements of the Annex “apply to FFP and the IQ portion of the annex” (*id.* at C6-3).

5. The solicitation further described the work as follows:

6.2.3 CHANGE OF OCCUPANCY MAINTENANCE (COM).

6.2.3.1 COM Requirements: COM work includes the performance of all maintenance, repair/replacement, and other work requirements required to make vacant housing units ready for the next resident Work requirements for COM’s are listed in Table 6-8.

(*Id.* at C6-6)

6. Table 6-8, “Change of Occupancy Work Requirements,” specified in pertinent part:

Change of Occupancy maintenance includes any required interior and exterior maintenance and repair/replacement work including, but not limited to, work of the types listed in the Change of Occupancy Work Authorization Form (Page 6-8-5) Change of Occupancy Work Authorization Form indicates the types of services that are projected to be accomplished during the Change of Occupancy period. The unit prices bid in the Bid Schedule, Section B, for change of occupancy maintenance include all required interior and exterior maintenance, repair, and replacement work. Any individual deficiencies (requiring less than \$500.00 for labor and materials), recorded on the Change

of Occupancy Work Authorization Form, shall be performed as a part of the COM price. Indefinite quantity task orders are frequently issued to be accomplished simultaneously with change of occupancy period.

(*Id.* at 6-8-1) The specifications provided for ordering painting in paragraph b. of Table 6-8, “Painting,” which stated “complete interior paint-outs will be ordered to be accomplished *in conjunction with a COM* in unoccupied quarters” and “[p]artial interior painting will be ordered to be accomplished *in conjunction with a COM* in unoccupied quarters or in occupied quarters” (*id.* at 6-8-2; emphasis added). The COM Work Authorization Form included “Paint All Exterior Doors, House Numbers, & Mailboxes” as a standard work item to be performed as part of the COM (*id.* at 6-8-5). The Annex included a separate Paint Work Authorization Form that provided for complete paint or partial paint and a description of the work including room locations for partial paint and special instructions (*id.* at 6-8-6).

7. Table 6-12, “Indefinite Quantity (IQ) Requirements” listed the requirements included in the IQ portion of the contract. Three of the tasks listed that are relevant here were additional quantities of change of occupancy maintenance (COM), additional quantities of complete paint, and additional quantities of partial paint. (*Id.* at 6-12-1)

8. Annex 7 in the contract included requirements for change of occupancy maintenance and painting of bachelor housing (*id.* at C7-3 *et seq.*).

9. The government issued Amendment No. 0007, effective 13 April 2000, that incorporated certain changes into the solicitation for the contract. The amendment included the following clarification:

Attention: The following is provided for clarification purposes.

The Firm Fixed Price work for Change of Occupancy (COMs) includes complete or partial custodial or interior painting. In addition, the Government may order complete or partial custodial or interior painting under separate IQ pre-priced line items.

(R4, tab 1 at 55) It is not known why the amendment was issued (tr. at 88).

10. The contract included standard clause FAC 5252.216-9310 COMBINATION FIRM-FIXED PRICE/INDEFINITE QUANTITY CONTRACT (OCT 1996) and incorporated by reference standard FAR clause 52.217-7 OPTION FOR INCREASED QUANTITY – SEPARATELY PRICED LINE ITEM (MAR 1989) (R4, tab 2 at I-1, -4).

11. Appellant subcontracted all of the Annex 6 services. Mr. Michael Davidson, senior vice president in charge of business development for Eastern Maintenance and Services, Inc. (Eastern Maintenance), prepared the bid for Annex 6 work on the basis of the specifications, the bid schedule quantities, the historical data and estimated quantities provided by the government, the company's historical cost data for performing similar tasks on the same type of contract, and his experience. Mr. Davidson has worked in government contracting since 1978 and has prepared over 60 bids for military family housing services for Eastern Maintenance since 1991. (Tr. 20-21, 23-24)

12. Mr. Davidson found the solicitation unusual because it called for the price of painting to be included in the COM pricing. Generally, in the experience of Eastern Maintenance, the Navy and other military services call for maintenance and painting services to be separately priced because the painting is not always needed when there is a change of occupancy, and the amount of painting that may be required varies greatly depending on the size of the unit. (Tr. 21-23, 33, 37) Mr. Davidson prepared the bid price for performance of the firm fixed-price work under Annex 6 by separately pricing the various maintenance services on a spreadsheet and then adding the separate prices to total a single lump sum price. He understood that the painting requirements of the fixed-price portion of Annex 6 would be performed as part of a FFP COM, and they were included in the lump sum price. (App. R4, tab 1; tr. 26, 29)

13. Mr. Davidson's experience was that painting is routinely performed when a unit is vacant at the time of a change of occupancy. He noticed that there was no separate line item in the solicitation to bid for IQ paint at Jacksonville although there was a line item for IQ COMs. Mr. Davidson considered it an inadvertent omission or perhaps the Navy did not intend to order any IQ paint at Jacksonville. Neither appellant nor Eastern Maintenance made a pre-bid inquiry to clarify how the Navy would order IQ paint at Jacksonville. (Tr. 39, 42-44)

14. Mr. Davidson relied on Amendment No. 0007 in pricing the painting. Annex 6 had only provided that "painting is ordered in conjunction with a COM," and the amendment made it clear that a change of occupancy included painting (finding 6, *supra*). Mr. Davidson testified:

[T]he second sentence was clear in my mind that if they wanted to order any painting outside the firm fixed price it would be ordered on the paint line item.

(Tr. 28-29) He also testified:

[G]oing back to Amendment 7 that said to me that IQ painting is going to be ordered under a separate pre-priced

line item for painting. We have a line item for IQ painting.
And, that's where we put our paint costs for IQ painting.

(Tr. 32-33) If the government had intended paint to be a part of an IQ COM, he expected it would have stated that both FFP and IQ COMs include paint, but it did not (tr. 50). According to Mr. Davidson, appellant made a reasonable interpretation based on the language of Amendment No. 0007 and prior experience with other military housing maintenance contracts (tr. 33, 50). Accordingly, Eastern Maintenance priced an IQ COM substantially lower than a FFP COM and submitted a separate bid price for IQ paint (tr. 30-32).

15. Mr. Davidson provided a spreadsheet of the Eastern Maintenance bid to appellant (app. R4, tab 1; tr. 45). The pricing was included as an exhibit to the subcontract between appellant and Eastern Maintenance. Appellant's bid included different numbers because of the addition of mark-ups, and the government did not know at the time of contracting how Eastern Maintenance prepared its bid. (Ex. G-2, ex. B; tr. 45, 76)

16. Eastern Maintenance did not price the cost of Annex 7 work until after the contract was awarded. The Navy did not order any IQ COMs under Annex 7. (Tr. 76, 90-91)

17. During contract performance, the Navy assigned IQ COMs but not IQ paints to go along with them. Appellant learned that the Navy's position was that an IQ COM included a complete paint. Appellant disagreed and planned to file a request for equitable adjustment. (Tr. 55-56) Appellant performed IQ painting when IQ COMs were assigned (tr. 40-41, 70-71).

18. On 9 April 2002, appellant submitted a claim for IQ paint in the amount of \$62,894.64 only for work performed at Mayport during the period 1 July 2001 through 30 September 2001.* Appellant claimed reimbursement of \$22,294.20 for the IQ paint line item 1016CF and an additional amount of \$40,600.44 for work which exceeded the IQ quantity. The claim included appellant's interpretation of the solicitation terms as justification and a spreadsheet detailing actual costs incurred. Eastern Maintenance included general and administrative costs and profit in the amount claimed to which appellant added mark-ups. (R4, tab 7)

19. On 20 February 2003, appellant resubmitted its claim in response to a letter, dated 3 February 2003, from the contracting officer (R4, tab 13). On 19 February 2004, appellant submitted an addendum to its claim for work performed in Option Year 2. The revised amount of appellant's claim was \$79,645.78. (R4, tab 12)

* The Navy did not order any IQ COMs at Jacksonville (tr. 90).

20. By letter dated 10 January 2005, the contracting officer denied appellant's claim for \$79,645.78 based on the contracting officer's interpretation of the contract read as a whole that there was no distinction between a FFP COM and an IQ COM which required ordering interior paint under a separate IQ line item. (R4, tab 14)

21. Appellant filed this timely appeal.

DECISION

Appellant maintains that the indefinite quantity line item for COM did not include the requirement to perform painting. Appellant argues its interpretation of the contract requirements was reasonable based on reading all the contract requirements and prior customary practice regarding performance of family housing maintenance and painting services. In the event the government's contrary interpretation was also reasonable, appellant submits that there was a latent ambiguity that should be construed against the government as the drafter of the specifications.

The government argues that there was no distinction between FFP COMs and IQ COMs as specifically stated in Annex 6 that its requirements applied to both portions of the contract. According to the government, the requirements for FFP and IQ COMs were identical: both included painting if ordered in conjunction with the COM. To the extent appellant relies on the clarifying amendment to the solicitation that IQ COMs arguably did not include painting, the contract contained an obvious, patent ambiguity that appellant was on notice to inquire about, but failed to do so.

When interpreting a contract, the document must be considered as a whole and interpreted so as to harmonize and give reasonable meaning to all of its parts. *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed Cir. 2004). Amendment No. 0007, on which appellant relies, is to be read in conjunction with paragraph 6.1.5 in Annex 6 which states that the requirements apply to both the FFP and the IQ portions of the Annex (finding 4). The amendment made it clear that FFP COMs included painting (finding 9). The amendment did not state that IQ COMs also included painting. The reference to painting as separate IQ pre-priced line items allowed for ordering additional painting. Appellant interprets the language as meaning that the government "would" order IQ painting separately (app. br. at 5). The terms of the amendment, however, use the word "may" which was permissive language that we consider did not reasonably indicate that an IQ COM did not include painting services. The contract, interpreted as a whole, provides that the requirements for fixed-price and indefinite quantity COMs are identical making the first sentence of Amendment No. 0007 applicable also to IQ COMs.

If the contract is considered susceptible to more than one reasonable interpretation, it is ambiguous, as appellant argues. Appellant found ambiguity in the Annex 6 COM

requirements as they related to painting services (app. br. at 14). In interpreting a contract, it is appropriate to receive evidence of trade practice and custom in an attempt to resolve an ambiguity. *HPI/GSA-3C, LLC v. Perry*, 364 F.3d 1327, 1334 (Fed. Cir. 2004); *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 753 (Fed. Cir. 1999). Mr. Davidson made his interpretation of the solicitation requirements in the context of the usual and customary procedure of requiring that maintenance services and painting services be separately priced and separately ordered. He found an apparent ambiguity in the requirement for a single lump sum price for all Annex 6 fixed-price work that was later resolved in his mind by the terms of Amendment No. 0007. He interpreted the amendment as leaving the IQ painting work to be separately priced as it was customarily handled. A supposed common practice is irrelevant, however, where the language of the contract is unambiguous on its face. *Jowett, Inc. v. United States*, 234 F.3d 1365, 1369 (Fed. Cir. 2000). Appellant's interpretation that COMs performed under the IQ portion of the contract would be treated in a manner consistent with the customary practice of separating painting from other maintenance services required in a COM cannot vary the plain language of the contract (app. br. at 8-13). We cannot find this interpretation reasonable because it neglects the provision of paragraph 6.1.5 that Annex 6 requirements apply to both FFP and IQ COMs.

The government maintains there is a patent ambiguity in appellant's interpretation of Amendment No. 0007, which draws a distinction between FFP COMs and IQ COMs, and paragraph 6.1.5, which states that the requirements of Annex 6 apply to both the FFP and IQ portions of the contract. 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. Thus a bidder has a duty to seek clarification from the government, and its failure to do so precludes acceptance of its interpretation. See *Stratos Mobile Networks USA, LLC v. United States*, 213 F.3d 1375, 1381 (Fed. Cir. 2000). There is a further ambiguity that arises from the omission of a CLIN for IQ paint at Jacksonville since there was no provision for painting, which is routinely performed, without a separate line item under appellant's interpretation of the solicitation. Mr. Davidson was in fact aware of this inconsistency (finding 13). Appellant has argued the omission was a latent ambiguity because of assumptions that can be made that the Navy considered FFP COMs would be sufficient to cover the needs for maintenance and painting, and, if the determination were found erroneous, the services could be added later (app. reply br. at 2-3). We do not consider these assumptions reasonable in light of the evidence that painting was routine at the time of COM (finding 13). The ambiguities here were obvious and patent. Appellant did not inquire before bidding, and its interpretation fails for this further reason.

At the hearing the government offered in evidence a document showing the units related to contract line items for IQ COMs and IQ paint for Mayport housing, Jacksonville housing and bachelor housing under Annex 7 in the contract (ex. G-1;

tr. 75). Appellant objected to the admissibility of the document on the grounds that the portion concerning bachelor housing was irrelevant: Eastern Maintenance did not price or bid bachelor housing work in Annex 7, it is not part of appellant's claim, and the parties' performance under a different part of the contract is not related to the contract interpretation question that is presented (findings 16, 18). The Board reserved its ruling on admissibility and provided the parties an opportunity to argue relevancy in their briefs (tr. 79, 96). Appellant has argued that any reliance on the requirements contained in Annex 7 would be misplaced (app. reply br. at 4). Exhibit G-1 is admitted in evidence as relevant to the reasonable interpretation of the contract provisions. The exhibit shows that the IQ COM estimated requirements were not supported by the amount of estimated IQ painting required if painting were not included in IQ COMs and required to be ordered separately (tr. 73-74, 80). The inclusion of Annex 7 requirements in this document does not serve to make it irrelevant to the contract interpretation question presented.

We have reviewed all the parties' other arguments to consider appellant's claim, but do not believe it necessary to discuss them to resolve the issue presented.

The appeal is denied.

Dated: 15 December 2005

LISA ANDERSON TODD
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. 54958, Appeal of Johnson Controls-Hill L.L.C., rendered in conformance with the Board's Charter.

Dated:

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