

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Ellis Environmental Group, LC) ASBCA Nos. 54066, 54067
)
Under Contract Nos. N62467-01-C-0318)
N62467-01-C-0361)

APPEARANCE FOR THE APPELLANT: Charles M. Laycock, Esq.¹
Corporate Counsel
Newberry, FL

APPEARANCES FOR THE GOVERNMENT: Thomas N. Ledvina, Esq.
Navy Chief Trial Attorney
Pamela J. Nestell, Esq.
Trial Attorney
Naval Facilities Engineering Command
Litigation Office
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE SHACKLEFORD

These appeals relate to two fixed-price construction contracts awarded to appellant Ellis Environmental Group, LC (EEG) for renovation of buildings at the Naval Air Station (NAS), Meridian, Mississippi. The contracts were subject to a Contractor's Use Tax levied by the State of Mississippi in the amount of 3.5 percent of the total contract prices. EEG was not aware of that tax when it responded to the requests for proposals for these contracts and consequently, failed to include the amounts thereof in the offered prices. The tax was not included in the prices of the awarded contracts. After discovering the omissions subsequent to award of the contracts, EEG requested exemptions from the tax from the State of Mississippi. The exemptions were refused, following which EEG submitted claims for price increases in the amounts of the Contractor's Use Tax it had been required to pay. The claims were denied, resulting in the present appeals.

¹ Terrance R. Ketchel, Esq. who tried these appeals withdrew on 20 December 2006.

FINDINGS OF FACT

1. On 26 July 2001 the Southern Division (SOUTHDIV) of the Naval Facilities Engineering Command (NAVFAC) requested EEG to submit a firm fixed-price proposal for renovation of Building 330 at NAS, Meridian, Mississippi (R4, tab 1). On 6 September 2001, SOUTHDIV requested EEG to submit a firm fixed-price proposal for renovation of Building 361 at NAS, Meridian, Mississippi (R4, tab 1A at 276). The solicitations were issued on a sole-source basis pursuant to Section 8(a) of the Small Business Act (ex. G-38 at 5, ex. G-39 at 5). Pursuant to a memorandum of understanding between NAVFAC and the Small Business Administration (SBA), award could be made on a noncompetitive basis up to a maximum amount of \$3,000,000 plus 10 percent, for a total of \$3,300,000. If award could not be made within that amount, any award under Section 8(a) would have to result from competition. (Tr. 2/199-200)

2. On 21 February 2002, Contract No. N62467-01-C-0318 (Contract 0318) was awarded to EEG on a sole source basis at a fixed price of \$3,290,017 for renovations of Building 330 (R4, tab 1 at 101). Also on 21 February 2002, Contract No. N62467-01-C-0361 (Contract 0361) was awarded to EEG on a sole source basis at a fixed price of \$2,875,178 for renovations of Building 361 (R4, tab 1A at 302).

3. The solicitations and the resulting contracts contained the FAR 52.229-4, FEDERAL, STATE, AND LOCAL TAXES (NONCOMPETITIVE CONTRACT) (JAN 1991) clause (R4, tab 1 at 87, tab 1A at 288). Paragraph (b) of the clause provides that:

Unless otherwise provided in this contract, the contract price includes all applicable Federal, State, and local taxes and duties.

4. Paragraph (a) of that clause defined “[a]ll applicable Federal, State, and local taxes and duties” to mean “all taxes and duties, in effect on the contract date, that the taxing authority is imposing and collecting on the transactions or property covered by this contract.”

5. On the dates of issuance of the solicitations and awards of these contracts, § 27-65-21, Construction activity contracts, of the Mississippi Code Annotated provided, in part, as follows:

(1)(a)(i) Upon every person engaging or continuing in this state in the business of contracting or performing a contract or engaging in any of the activities . . . listed below for a price . . . there is hereby levied, assessed and shall be collected a

tax equal to three and one-half percent (3- 1/2 %) of the total contract price . . . from constructing, building, erecting, repairing . . . or adding to any building . . . when the compensation received exceeds Ten Thousand Dollars (\$10,000.00). . . . The tax imposed in this section is levied upon the prime contractor and shall be paid by him.

. . . .

(b) The following shall be excluded from the tax levied by this section:

(i) The contract price or compensation received for constructing, building, erecting, repairing or adding to any building . . . or structure which is used for or primarily in connection with a residence or dwelling place for human beings.

MISS. CODE ANN. § 27-65-21.

6. EEG had no knowledge of the tax levied on construction contractors (Contractor's Use Tax) by the Mississippi Code at the time of preparation and submission of price proposals for these contracts (tr. 1/71). Neither the proposals nor the prices of the awarded contracts contained any amount for this tax (R4, tab 7; tr. 1/44-45). EEG made no inquiries or investigations concerning Mississippi taxes prior to submission of its proposals (tr. 1/121-22). EEG "just didn't think about it" (tr. 1/122).

7. EEG had never performed a construction contract for the government in Mississippi or reviewed solicitations for such work (tr. 1/182-83). An amount for sales tax on materials was included in EEG's price proposals for the present contracts because this had been a "normal customary tax" in the jurisdictions in which it had previously performed construction contracts (tr. 1/153-54). The amount included by EEG for sales tax in these proposals was based on the 7.5 percent sales tax it included in proposals to NAVFAC for construction projects in Florida (tr. 1/69, 121).

8. On or about 30 April 2002, the NAVFAC Forms 4330 (Proposal/Estimate for Contract Modification) submitted by EEG for the proposed additional work of relocating ADP facilities in Buildings 330 and 361 were returned by Mr. Clark Ramsey, the ROICC project manager at NAS Meridian, MS, with several changes, among which was the insertion of a new Line 31b for "MS Tax (3.5%)." Shown on that line was an additional cost which was the product of applying that rate to the total offered price of the

modification. EEG responded by thanking Mr. Ramsey for adding the amount of that tax to the proposed price. EEG stated, also, that “[t]his is our first time working in Mississippi and [we were] unaware of this requirement” and that the tax “was not included in our original contract proposal or addressed during negotiations.” (App. supp. R4, tab 10)

9. On 9 May 2002, EEG advised the contracting officer at SOUTHDIV and Mr. Ramsey that, through ignorance, EEG had failed to include any amount for the Contractor’s Use Tax in its price proposals for the contracts. EEG requested “any assistance, guidance or information you can provide that will help [us] in deciding how to deal with this substantial liability.” (R4, tab 4)

10. On 9 May 2002, the SOUTHDIV contracting officer responded by quoting the provision of FAR 52.229-4 that “the contract price includes all applicable Federal, State, and local taxes and duties.” In addition, he suggested that EEG apply to the Mississippi State Tax Commission for an exemption of the awarded contract price from the tax. (R4, tab 5)

11. On 23 May 2002, EEG applied for such exemption on the basis that “[o]ur company was unaware of this tax assessment during negotiations and the contracting officer from Southern Division never brought this tax liability to our attention prior to contract award” (R4, tab 7). The Mississippi State Tax Commission denied the application on 2 July 2002 for the reason that there was no statutory provision for such exemption (R4, tab 8).

12. By letter dated 12 July 2002, addressed to the contracting officer at ROICC, NAS Meridian, MS, EEG requested equitable adjustments to the prices of Contracts 0318 and 0361 in the amounts of \$115,150.60 and \$100,631.23, respectively. These represented the amounts of Contractor’s Use Tax which had been omitted from the price proposals and awarded contract prices. (R4, tab 9)

13. In a letter dated 23 July 2003, the contracting officer denied the requests for price increases for the omitted amounts of Contractor’s Use Tax, asserting that the increases were precluded by FAR 52.229-4 (R4, tab 10). By letters dated 29 August 2002, EEG resubmitted the requests for equitable adjustment as claims certified under the Contract Disputes Act, 41 U.S.C. §§ 601-613, as amended (CDA) (R4, tabs 11, 11A). The contracting officer denied these claims by written decision dated 21 October 2002 (R4, tab 12), resulting in these appeals.

14. The NAVFAC Form 4330 setting forth EEG’s price proposal for additional work subsequent to contract award had previously been used by EEG during the

negotiation of the contract for submittal of price proposals. The final such submittals, dated 14 February 2002, contained the offers accepted by the government, resulting in award of these contracts (R4, tab 1 at 101, tab 1A at 302). The NAVFAC Form 4330 consisted of two sides of a single sheet. The front side contained: Lines 1-10, listing various types of costs for the prime contractor's work; Lines 11-23, listing the same types of costs for subcontractors work; and Lines 24-32, titled "SUMMARY," for insertion of the prime contractor's overhead costs, profit, bond premium, and the total proposed price. The other side of the NAVFAC Form 4330 was for showing breakdowns of direct costs of work by the prime contractor and subcontractors.

15. The NAVFAC Form 4330 modified by the insertion of a new Line 31b for "MS Tax (3.5%)," (hereinafter "modified NAVFAC 4330") had been promulgated by ROICC several years earlier for use in requesting price proposals for proposed changes under contracts for construction work in Mississippi. Line 31b had been introduced in order to assure that the Contractor's Use Tax would be included in proposals for work subject to that tax. The ROICC's practice was to furnish a copy of the modified NAVFAC 4330 to the contractor whenever requesting proposals for contract modifications. (Tr. 2/235-36, 258) If the contractor submitted a proposal subject to that tax using a NAVFAC Form 4330 which did not contain a line for entry of that amount, it was the general practice of the ROICC office to bring the omission to the attention of the contractor, as was done here (tr. 2/264-66).

16. For at least five years prior to the award of these contracts, clause MS 1, titled "TAXES," had been included in construction contracts awarded by ROICC. In part, the clause stated that:

Under "Rule 41, Construction Contractors" the Mississippi's [sic] State Tax Commission levies a tax of 3.5% of the total contract amount or compensation received from all contracts, including contracts with the United States Government, except residential construction that exceed \$10,000 when the work to be performed is construction, grading, excavating, building . . . or any other improvement, or structure or any part thereof. Questions concerning the applicability of State Taxes should be addressed to: Mississippi State Tax Commission

(Ex. A-1; tr. 2/257-58)

17. The "TAXES" clause was included in a contract which was the subject of the appeal in *Costello Industries, Inc.*, ASBCA No. 49125, 02-BCA ¶ 31,098 also relating to

a contract for construction at NAS Meridian. That contract had been awarded on 30 September 1993. Clause MS 1 was not included in the present solicitations or resulting contracts which were issued and awarded by SOUTHDIV (tr. 2/259).

18. None of the three individuals who eventually served as contracting officers during the solicitation period for these contracts were aware of the Contractor's Use Tax prior to the submittal of the claims involved in this appeal (tr. 2/155, 3/93, 147). After learning of Clause MS 1 as a result of the present monetary claims submitted by EEG, one of these contracting officers, Ms. Rhonda Earney, included the clause in a contract awarded by SOUTHDIV for airfield lighting at NAS Meridian (tr. 3/180-81). She did not include the clause in any subsequent SOUTHDIV contracts however, on advise of counsel (tr. 3/183).

19. Mr. Larry R. Fisk, another individual who served as contracting officer during the course of the solicitation for these contracts, testified that had he been aware that an offeror had no knowledge of the Contractors Tax and had omitted the same from its offered price, he would have alerted the offeror to the omission (tr. 2/156). He stated that "[w]e never want things to be left out unknowingly" because for "the remainder of the job, [the contractor is] looking for a way to recover from that omission, which causes friction." Accordingly, Fisk felt it was best to go into a project with eyes open knowing all costs at the outset. (Tr. 2/157) Mr. John Jeffries, who also served as a contracting officer for these projects during the solicitation period, testified that he, too, "would have notified the contractor of his omission, error, or lack of putting it into the price" (tr. 3/117).

20. SOUTHDIV's policy, with regard to acquisition of construction work, under Section 8(a), was to reserve, for itself, the solicitation and award of construction contracts utilizing the design-build format, as was the case for the present contracts (tr. 2/194-95, 222-23). Under that format, the government would furnish only a specification setting forth its needs and the contractor would be responsible for devising the design of the facility, including the preparation of required drawings. For projects involving normal construction where the government furnishes drawings and specifications, the acquisition would be assigned entirely to the ROICC. (Tr. 2/193-94)

21. Where the design-build format was used, the ROICC's role was to assist SOUTHDIV on scoping issues and customer priorities (tr. 2/223). For that purpose, the ROICC would be furnished with copies of the request for proposals (including specifications) in advance of issuance of the solicitation. The ROICC, however, would typically not receive copies of the general conditions portions of the solicitation. (Tr. 2/231, 3/12-13) As was typical of design-build acquisitions, the negotiation team for the present contracts was composed exclusively of SOUTHDIV personnel (tr. 2/222-23).

An individual at SOUTHDIV was named in the solicitation as the person to be contacted with any questions regarding the acquisition (tr. 3/36).

22. Consistent with its advisory role, the ROICC office did not participate in the negotiation of the price or other terms of these contracts. The negotiation was conducted by a contracting officer from SOUTHDIV supported by a technical team from SOUTHDIV. Members of the ROICC office were present during the discussions but their role was mainly to ascertain and advise SOUTHDIV of the needs of the Naval Technical Training Command (NTTC), the prospective occupant of the renovated buildings. (Tr. 2/222-23)

23. On 10-11 December 2001, the government and EEG held detailed discussions of the work scopes of the two projects with the objectives of refining and reducing the costs proposed by EEG so as to bring the projects within the available funds and with features which met the needs of NTTC (exs. A-6, -7; tr. 1/55). Among the attendees were three individuals from the ROICC office who were familiar with the practice of including the MS 1 TAXES clause in solicitations and contracts issued by the ROICC. One of these was Mr. David Stevens, then serving as construction manager in the ROICC office (tr. 2/226). Mr. Stevens was also familiar with the ROICC's use of the modified Form 4330 (tr. 2/235).

24. Another attendee at the 10-11 December 2001 discussions was Mr. Larry Doles, a contract specialist in the ROICC office. He had been responsible for pre-award duties in connection with construction contracts issued by the ROICC office. (Tr. 3/6) In the course of those duties, he had included the MS 1 clause in those contracts (tr. 3/19). A third attendee from the ROICC office was Mr. Henry Burns, the Resident Engineer in Charge of Construction (tr. 2/246, 253). He knew of the use of the modified NAVFAC Form 4330 by the ROICC office for at least the previous five years (tr. 2/255, 258).

25. The ROICC office did not participate in the preparation of government cost estimates and did not regularly receive copies of price proposals submitted by EEG on NAVFAC Form 4330. Mr. Larry R. Fisk, who was one of the three SOUTHDIV contracting officers responsible at various times for negotiation of these contracts, testified that he saw no need to furnish the proposals to the ROICC because "basically, they had their own jobs to do and [SOUTHDIV] had ours to do" (tr. 2/224). However, at the end of the meeting on 11 December 2001, EEG gave the ROICC office members, who had been present at the discussions, copies of the latest price proposals, set forth on NAVFAC Form 4330, which had been revised to reflect the results of the discussions. (Tr. 1/55, 67). As was the case of all prior proposals, the NAVFAC Form 4330 used was

the version contained in EEG's computer system which did not contain a line for insertion of the Mississippi Contractor's Use Tax (tr. 1/44-45).

26. NAVFAC used historical costs and a government estimate in determining whether prices proposed for construction work were fair and reasonable (tr. 3/89). The record contains initial government cost estimates for both of the instant projects dated 7 August 2001 (exs. G-36, -37; tr. 3/152). The estimates were prepared by Mr. Luke Guthrie, a cost engineer employed by SOUTHDIV, who was also a member of the negotiating team for award of these contracts (tr. 2/216).

27. Subsequent to the discussions on 10-11 December 2001, Mr. Guthrie was asked to prepare revised government estimates which would reflect the changes in work scope of the two projects resulting from those discussions (tr. 3/153). The revised estimates are in the record (ex. G-36A). Although these documents show 7 August 2001 as the "DATE OF ESTIMATE" and July 2002 (subsequent to the contract awards) as the "REPORT REVISION DATE," the Board was informed by counsel at the hearing that the electronic files maintained by Mr. Guthrie show a preparation date of 31 January 2002 for that document (tr. 3/154-55). Set forth in the "Markup Report" sections of those revised estimates is a line item titled "MISSISSIPPI GROSS RECEIPTS TAX," in the amount of 3.63 percent, which was not contained in the initial government estimates (exs. G-36A, -37).

28. Ms. Earney, who was the last of the three SOUTHDIV contracting officers assigned to these projects, did not examine any of the government estimates in their entirety prior to the contract awards. The indirect cost rates were the only data from those estimates with which she was familiar. (Tr. 3/135-36) She had requested, but had not received or read, any of the government estimates prior to award of the contracts (tr. 3/148).

DECISION

Appellant seeks to recover the amounts of Contractor's Use Tax it was required to pay by the State of Mississippi and claims entitlement due to a unilateral mistake. It is undisputed that neither appellant nor the government negotiators knew of this tax during their negotiations and it was not included in the contract amounts agreed upon. EEG made no inquiry or investigation prior to submitting its proposals. While the ROICC Meridian contracting personnel were aware of the tax and had a peripheral involvement in the development of the contracts, the persons in SOUTHDIV responsible for the negotiations were not aware of it.

In its initial brief appellant argues that it is entitled to recover based upon a unilateral mistake without referencing FAR 52.229-4. Responding, the government cites the clause and discusses case law interpreting the operation of this clause without explaining how it applies to the instant case. The government then goes on to discuss why the unilateral mistake theory must fail. Replying, appellant points out that the government implicitly argues that FAR 52.229-4 precludes "[a]ppellant from succeeding under a unilateral mistake cause of action as a result of the inclusion of FAR 52.229-4" but rejects that view because the cases cited by the government did not involve a unilateral mistake cause of action. The Court of Appeals for the Federal Circuit has held that language in the tax clause applicable to competitive procurements (FAR 52.229-3), unambiguously required bidders to include all applicable taxes. *Hunt Construction Group, Inc. v. United States*, 281 F.3d 1369 (Fed. Cir. 2002). We applied *Hunt Construction* when examining the tax clause applicable to negotiated procurements, FAR 52.229-4, which is at issue here. *AG Engineering, Inc.*, ASBCA No. 53370, 04-1 BCA ¶ 32,482.

In *Holmes & Narver Constructors, Inc.*, ASBCA Nos. 52429, 52551, 02-1 BCA ¶ 31,849 at 157,395, we stated with respect to this clause² as follows:

[T]he contract in this case incorporated the FAR's standardized FEDERAL, STATE, AND LOCAL TAXES clause, which expressly warned that "[t]he contract price includes all applicable Federal, State, and local taxes and duties." (SOF 15) Such a clause "places upon the contractor the burden of determining which taxes are applicable and of including in his bid price a sufficient amount to cover the payment of those taxes." *Eller Constr., Inc.*, ASBCA No. 22654, 78-2 BCA ¶ 13,511 at 66,199 (interpreting predecessor clause to FAR 52.229-3). In other words, "a bidder must include the amount of a tax in its bid or assume the risk of paying it without reimbursement since the duty of determining tax applicability is on the bidder." *Gibson Motor & Machine Serv., Inc.*, ASBCA No. 24363, 80-1 BCA ¶ 14,442 at 71,202. See also *Allied Painting & Decorating Co.*, ASBCA No. 43287, 93-3 BCA ¶ 26,218 at 130,483, *aff'd*, 39 F.3d 1197 (Fed. Cir. 1994) (table).

² The discussion concerned a claim for misrepresentation, not unilateral mistake.

Because FAR 52.229-4 unambiguously required appellant to include all taxes in the contract price, the sole argument left was for appellant to argue that it is not bound by that clause due to its own unilateral mistake.

We have held that “[i]t would be unfair or unconscionable for the Government to take advantage of a contractor’s mistake in bid if the Government knew or should have known of the mistake prior to contract award.” *Pavco, Inc.*, ASBCA No. 23783, 80-1 BCA ¶ 14,407 at 71,031. As set forth in *Holmes & Narver, supra*, 02-1 BCA at 157,392-93, to establish that a contractor has made a unilateral mistake, proof of five elements is necessary:

A contractor seeking post-award reformation of its contract on grounds of unilateral mistake has the burden of proving by clear and convincing evidence the following five elements:

“(1) a mistake in fact occurred prior to contract award; (2) the mistake was a clear-cut clerical or mathematical error or a misreading of the specifications and not a judgmental error; (3) prior to award the Government knew, or should have known, that a mistake had been made and, therefore, should have requested bid verification; (4) the Government did not request bid verification or its request for bid verification was inadequate; and (5) proof of the intended bid is established.”

McClure Elec. Constructors, Inc. v. Dalton, 132 F.3d 709, 711 (Fed. Cir. 1997), quoting *Solar Foam Insulation*, ASBCA No. 46921, 94-2 BCA ¶ 26,901, see also *Giesler v. United States*, 232 F.3d 864, 869 (Fed. Cir. 2000). A contractor is not precluded from recovery for unilateral mistake even though the contractor may have been negligent in preparing its bid or proposal. *Ruggiero v. United States*, 420 F.2d 709, 713 (Ct. Cl. 1970). [Footnote omitted]

As for the first element, while the government argues it is not entirely clear a mistake was even made based upon appellant’s non-production of bid sheets at trial (gov’t br. at 30), we are satisfied that a mistake was made by appellant in not including the Mississippi Contractor’s Use Tax in its cost proposals. To be sure, it was a mistake based upon ignorance of the existence of the tax.

Proving the second element is more problematic for EEG. The mistake is required to be a clear-cut clerical or mathematical error or a misreading of the specifications *and* not a judgmental error. Both must be established. *Rockwell International Corp.*, ASBCA No. 41095, 95-1 BCA ¶ 27,459. Appellant cites *Chemtronics, Inc.*, ASBCA No. 30883, 88-2 BCA ¶ 20,534, and *Midland Maintenance, Inc.*, ENGBCA Nos. 6080 *et al.*, 96-2 BCA ¶ 28,302 in support of its contention that a qualifying mistake was made. In *Chemtronics*, a supplier gave an erroneous price quote on specialized aluminum foil (\$1.61 per 100,000 square inches rather than \$1.61 per 1,000 square inches) and we held that the error was a clear-cut clerical error and the fact it was made by a supplier was irrelevant. We further found that the contractor's mistaken reliance on that quotation was not an error of judgment. *Chemtronics* provides no support to appellant. There the clerical error was the incorrect quotation. Here there was no quotation for the Mississippi Contractor's Use Tax. In *Midland*, the Department of Labor (DOL) had issued an interpretation requiring contractors to pay truck driver rates to employees driving pickup trucks from place to place within a job site. DOL asked the contracting agency to inform contractors of this interpretation and it failed to do so. Analyzing the claim under a superior knowledge theory, the ENG Board found entitlement. It also analyzed the case as a mistake in bid, and used FAR 14.406-4 to define a qualifying mistake. The Board did not analyze the case in the context of a "clear-cut clerical or mathematical error or a misreading of the specifications and not a judgmental error" such that we can determine if it has application to the instant case.

We conclude that the failure to ascertain the nature and extent of taxes required by the State of Mississippi was not a clear-cut clerical error or mathematical error. Nor, was it a misreading of the specifications. Rather, it was a judgmental error. The contract and case law placed the burden of ascertaining which taxes are applicable squarely on EEG. EEG included a Florida sales tax in its estimate but neglected to ascertain the nature of taxes required in the State of Mississippi. Consequently, the mistake made was not a qualifying mistake that would entitle EEG to reformation.

Because element two was not proved, it is unnecessary for us to address the remaining elements for reformation based upon unilateral mistake.

CONCLUSION

For reasons stated, the appeals are denied.³

Dated: 9 April 2007

RICHARD SHACKLEFORD
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

PETER D. TING
Administrative Judge
Acting 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 Nos. 54066, 54067, Appeals of Ellis Environmental Group, LC, rendered in conformance with the Board's Charter.

Dated:

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

³ Prior to the hearing, the government moved for summary judgment denying these appeals. That motion is mooted by this decision.