

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
American Bridge Company) ASBCA No. 54867
)
Under Contract No. N62467-03-C-0154)

APPEARANCES FOR THE APPELLANT: Dirk D. Haire, Esq.
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OPINION BY ADMINISTRATIVE JUDGE TUNKS

American Bridge Company (appellant) seeks \$784,870 as a result of a dispute over the material requirements for low-voltage switchgear. Only entitlement is before us.

FINDINGS OF FACT

1. On 15 March 2003, the Naval Facilities Engineering Command, Southern Division (NAVFAC) issued Request for Proposal (RFP) No. N62467-03-R-0154 for the Truman Harbor Repair project at the Naval Air Facility, Key West, Florida (R4, tab 1 at Bates 761). The work included repair of the primary electrical distribution system (R4, tab 1 at Bates 004).

2. Paragraph 2.2. of specification section 16442N, entitled "SWITCHGEAR," provided, in part, as follows:

2.2.2 Construction

Switchgear shall consist of vertical sections bolted together to form a rigid assembly Compartmentalized switchgear shall have vertical insulating barriers . . . in

accordance with NEMA LI 1, Type GPO-3, 0.25 inch minimum thickness. . . . Switchboard Switchgear shall be completely factory engineered and assembled, including protective devices and equipment indicated with necessary interconnections, instrumentation, and control wiring.

(R4, tab 2 at Bates 720-21)

3. Paragraph 2.2.2 did not specify the material to be used for the switchgear.
4. Paragraph 2.2.2.1, entitled “Enclosure,” provided, in part, as follows:

Switchgear enclosures shall include weatherproof outdoor walk-in style air filled compartment enclosing the front of the switchgear where all of the following are installed, viewed, operated, maintained, and replaced: circuit breakers, fuses, digital displays and meters, transformers, controls and instruments and associated power and control wiring, control power fuse blocks, and terminal blocks. . . . [E]nclosure[s] shall be of all stainless steel construction, NEMA ICS 6 Type 3R, including any portion of the housing, base, support frame, structural members, hardware internal and external to enclosure, exposed to the atmosphere either directly or indirectly. Stainless steel used in the fabrication of switchgear enclosures shall conform to ASTM A 167, type 304

(R4, tab 2 at Bates 721)

5. Paragraph 1.1 of specification section 16050N, entitled “BASIC ELECTRICAL MATERIALS AND METHODS,” incorporated the “Dictionary of Electrical and Electronics Terms” (IEEE Std 100) into the contract by reference. The publication defines a “switchgear assembly” as “[a]n assembled piece of equipment (indoor or outdoor) including, but not limited to, one or more of the following: switching, interrupting, control metering, protective, and regulating devices, together with their supporting structures, enclosures, conductors, electric interconnections, and accessories” (supp. R4, tab GS-2 at 84). Specification section 16442N does not refer to a “switchgear assembly.”

6. On 22 April 2003, Florida Keys Electric, Inc. (FKE) submitted a proposal to appellant for the electrical work, including the work required by specification section 16442N (app. supp. R4, tab 226). FKE’s proposal was based on a quotation from Square

D, a large manufacturer of switchgear and switchgear enclosures. Square D interpreted the specification to require mild steel switchgear housed in a stainless steel enclosure. (App. supp. R4, tab 231 at Bates 3530, 3538; tr. 1/138-41, 153-55)

7. Based on the proposal provided by FKE, appellant submitted a bid to NAVFAC the same day (R4, tab 1 at Bates 764; tr. 1/22, 25, 67). Mr. Brian Petersen, appellant's vice president, testified that the company's standard business practice is to rely on its electrical subcontractors and switchgear suppliers to interpret specifications for switchgear (tr. 1/64). He testified, in part, as follows:

Q [W]hat are American Bridge's standard business practices in connection with reliance on electrical subcontractors and electrical switchgear suppliers for purposes of evaluating specifications and developing pricing proposals?

A Well, American Bridge solicits proposals from subcontractors . . . which it relies on when it prepares its bid, and, in turn, we assume any suppliers that our subs solicit, they rely on the pricing that they receive from the respective suppliers.

Q [W]as this the process that was used by American Bridge for the Truman Harbor project?

A Yes.

Q Did American Bridge receive any bids from subcontractors for the electrical work [at] Truman Harbor . . . ?

A Yes, they – yes, we did.

Q Do you recall how many?

A Several.

. . . .

Q Did American Bridge rely on any of these electrical subcontractor bids in its bid to the Navy?

A Yes.

Q Which one?

A Florida Keys Electric.

(Tr. 1/66-67)

8. Appellant's practice of relying on switchgear manufacturers and distributors to interpret switchgear specifications for bidding purposes is consistent with the practices of the other electrical contractors and distributors that testified (tr. 1/21-22, 135, 139-40, 161, 165, 2/19, 60-61).

9. On 30 April 2003, NAVFAC awarded the subject contract in the amount of \$12,974,706 to appellant (R4, tab 1 at Bates 762).

10. After award, FKE refused to execute a subcontract due to bonding problems and price increases (tr. 1/25-26, 74-75).

11. On 11 August 2003, appellant awarded a subcontract to Electric Maintenance and Construction, Inc. (EMC) (app. supp. R4, tab 235; tr. 1/75-76). EMC had originally submitted a bid to NAVFAC for the prime contract (tr. 1/161). EMC's price to appellant was based on a quotation from Eaton/Cutler Hammer (E/CH), another large manufacturer of switchgear and switchgear enclosures (app. supp. R4, tab 242). Mr. Robert Gaitens, a senior E/CH sales engineer for switchgear, provided the quotation to EMC. Mr. Gaitens testified that he interpreted the specification to require mild steel switchgear because "it only referred to stainless steel in the enclosure in 2.2.[2.]1." (Tr. 2/58-59, 64)

12. On 16 December 2003, appellant forwarded Transmittal No. 076 to NAVFAC (R4, tab 5 at Bates 834; tr. 1/82). The submittal proposed mild steel switchgear housed in a stainless steel enclosure (tr. 2/64, 4/145; exs. A-279, -280).

13. On 13 January 2004, NAVFAC rejected Transmittal No. 076, stating, in part, as follows:

The switchgear assembly, which includes the switchgear skin enclosure, shall be completely factory engineered and assembled by the drawout circuit breaker manufacturer. The entire switchgear structure, including housing, base, support frame, structural members hardware internal and external to housing and hardware external to enclosure, exposed to the atmosphere either directly or indirectly, shall be of all stainless steel construction. . . .

(R4, tab 9 at Bates 1110, ¶ p.)

14. On 19 February 2004, appellant wrote NAVFAC that it interpreted the specification to mean that only the enclosure was to be constructed of stainless steel. Since no material was specified for the switchgear, appellant stated that it had interpreted the specification to mean that the switchgear was to be constructed in accordance with the industry standard, which was mild steel. (R4, tab 15)

15. On 17 March 2004, the government directed appellant to provide stainless steel switchgear (R4, tab 16).

16. Of the five known switchgear manufacturers that examined the switchgear specification, four interpreted it to require mild steel switchgear. Square D's quotation to FKE interpreted the specification to require mild steel switchgear (app. supp. R4, tab 231 at Bates 3530, 3538; tr. 1/138-41, 153-55). E/CH quoted the prime contract to appellant in April 2003. However, the sales engineer who testified at the hearing could not tell from the documents in the record what material was proposed for the switchgear. (App. supp. R4, tab 10; tr. 2/72-75). E/CH also provided a quotation for the subcontract appellant awarded to EMC in August 2003. The quotation interpreted the specification to require mild steel switchgear. (App. supp. R4, tabs A241, 242; tr. 1/162-69, 2/60-62). Siemens Energy & Automation, Inc., another company that submitted a quotation to EMC for the prime contract, interpreted the specification to require mild steel switchgear (tr. 2/50; app. supp. R4, tab 214). And finally, M&I Electric Industries, Inc., a switchgear manufacturer that quoted the project to another unsuccessful bidder for the prime contract, Van and Smith Company, Inc., interpreted the specification to require the switchgear to "be manufactured using mild steel components, not stainless steel" (app. supp. R4, tab 234 at Bates 4055; tr. 92-93). Only Kinney Electrical Manufacturing Company interpreted the specification to mean that the switchgear was to be constructed of stainless steel (tr. 4/11-12; app. supp. R4, tab 209 at Bates 4705).

17. On 4 June 2004, appellant submitted a certified claim in the amount of \$784,870 for the additional costs incurred in providing stainless switchgear (R4, tab 28).

18. The contracting officer, Mr. David Demoske, denied the claim on 22 November 2004, stating as follows:

It is the Government position that AB's [American Bridge's] interpretation is unreasonable in that it is unduly restrictive and ignores or renders meaningless a portion of paragraph 2.2.2.1. Paragraph 2.2.2.1 requires that the switchgear enclosure be stainless steel, as AB agrees. However, AB has apparently chosen to ignore that portion of paragraph 2.2.2.1 which sets forth that "*any portion of the [switchgear] housing, base support frame, structural members, hardware internal or external to [the] enclosure exposed to the atmosphere either directly or indirectly*" shall also be stainless steel. [Emphasis in original]

(R4, tab 34)

19. At the hearing, Mr. Demoske acknowledged that he added the bracketed word "switchgear" in the last sentence of the final decision and that the word does not appear in paragraph 2.2.2.1 of the specification (tr. 5/9).

20. Appellant appealed the denial of its claim to this Board on 10 December 2004.

DECISION

Appellant argues that it reasonably interpreted the specification to mean that the switchgear was to be constructed of mild steel, because only paragraph 2.2.2.1, which related to the enclosures, specified stainless steel. Paragraph 2.2.2, which related to the switchgear, was silent with respect to the material to be used. The government argues that the specification required both the switchgear and the enclosure to be constructed of stainless steel.

The rules of contract interpretation are settled. A contract is read in accordance with its express terms and the plain meaning thereof. A contract provision is ambiguous when it is susceptible to more than one reasonable interpretation. *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1543-44 (Fed. Cir. 1993). To prove an ambiguity, it is not enough to show that the parties interpreted the provision differently. Both interpretations must fall within a "zone of reasonableness." *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 751 (Fed. Cir. 1999). If the ambiguity was latent, *e.g.*, not "so glaring as to raise a duty to inquire," it will generally be construed against the drafter under the doctrine of *contra proferentem*. *Newsom v. United States*, 676 F.2d 647, 649-50 (Ct. Cl. 1982). In order to avail itself of the doctrine, the contractor must prove

that it relied on its interpretation during bid preparation. *Fruin-Colnon Corp. v. United States*, 912 F.2d 1426, 1430 (Fed. Cir. 1990).

Appellant's interpretation accords with the plain meaning of the specification. Paragraph 2.2.2 did not call out any material requirements for the switchgear. Only paragraph 2.2.2.1, which related to the enclosures, specified stainless material. Even if specification 16442N was susceptible of more than one reasonable interpretation, appellant has amply demonstrated that its interpretation was within a zone of reasonableness. Four out of the five manufacturers that examined the specification reached an interpretation contrary to that of the government. Since the ambiguity was latent, appellant was not under a duty to submit a prebid inquiry. Appellant also demonstrated that it relied on its interpretation during bid preparation.

The government advances several arguments in favor of its interpretation. It argues that IEEE Std 100 defines the term "switchgear assembly" as including both the switchgear and the switchgear enclosure. Based on this definition, the government argues that appellant was required to construct the switchgear and the switchgear enclosure of stainless steel. This argument is not persuasive because even if an assembly includes the switchgear as well as the switchgear enclosure, the specification only required the latter to be stainless steel. The government also argues that E/CH interpreted the specification to require stainless steel switchgear in the quotation it provided to appellant for the prime contract. Notwithstanding the government's contention, the E/CH sales engineer who testified at the hearing could not identify what material had been proposed for the switchgear from the documents in the record. The bottom line is that if the government had wanted to specify that the switchgear be constructed of stainless steel, it could have easily done so. Having failed to clearly communicate its intent, the government may not "impose the cost of a later and more expensive reading [upon] the contractor." *Sanchez, supra*, 6 F.3d at 1544. We have considered and rejected the other arguments advanced by the government.

The appeal is sustained. Quantum is remanded to the parties. In the event the parties are unable to resolve quantum, the contracting officer is directed to issue a final decision from which further appeal may be taken.

Dated: 10 May 2007

ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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. 54867, Appeal of American Bridge Company, rendered in conformance with the Board's Charter.

Dated:

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