

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Dick Pacific/GHEMM, JV) ASBCA No. 55806
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Under Contract No. DACA85-02-C-0004)

APPEARANCE FOR THE APPELLANT: Erik D. Eike, Esq.
Honolulu, HI

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
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OPINION BY ADMINISTRATIVE JUDGE SCOTT

Dick Pacific/GHEMM, JV (DP/G) has appealed under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, from the contracting officer's (CO) final decision denying its claim on behalf of its subcontractor ISEC, Inc. (ISEC). Appellant has elected Board Rule 12.3's accelerated procedures. The parties have submitted the appeal for decision on the record, without a hearing, under Board Rule 11. We decide entitlement only.

SUMMARY FINDINGS OF FACT

On 19 February 2002 the United States Army Corps of Engineers (Corps) awarded the subject contract for Bassett Hospital Replacement at Fort Wainwright, Alaska, to DP/G in the amount of \$178,289,000. The Architect and Engineering (A&E) firm HKS, Inc./Wingler & Sharp (HKS/WS) designed the project and was responsible for responding to requests for information (RFIs). The Corps planned for follow-on contractors to perform miscellaneous work. (Compl., answer ¶¶ 1, 4, 5; gov't br., ex. 1 (Willson aff.), ¶¶ 1, 3) The original contract completion date was 17 June 2006 (*see* ASBCA No. 55826, R4, tab 155 at 000744, ¶ A; supp. R4, tab 321 at 00800-1, § SCR-1). DP/G's initial schedule, as extended for weather delays, called for a 29 November 2005 completion date (app. supp. R4, tab 38 (Mohr aff.), ¶ 2).

Over six months after contract award, DP/G and ISEC entered into a \$2,100,000 subcontract dated 29 August 2002. ISEC was to perform the contract work related to the installation of medical and dental equipment and casework, in accordance with DP/G's schedule. Greg Timmerman, then a regional manager for ISEC's northwest region, signed the subcontract, which incorporated the contract plans and specifications, and referred to the technical specifications (TS) sections addressed below. Mr. Timmerman prepared ISEC's scope of work and ultimately was responsible for its estimate and subcontract. He interpreted the prime contract in connection with ISEC's bid and subcontract to identify only one JSN (joint schedule number) S1100 modular wall, located per the contract drawings at the north end of room 204-03. (App. supp. R4, tab 33 at 1, 2, 4, 16 of 16, ex. B at 1 of 4, tab 37 (Timmerman aff.), ¶¶ 1, 2) DP/G's and ISEC's estimates are not of record. DP/G has not submitted evidence of its modular wall interpretation at the time it entered into its contract; or evidence that it relied upon ISEC's interpretation at that time; or evidence that DP/G's estimate for the medical and dental equipment and casework was based upon estimates that were comparable to that of ISEC.

Prior to contract award, solicitation "AMENDMENT 0005," "SECTION 00700" added Federal Acquisition Regulation (FAR) clause 52.215-8 to the contract as follows:

AM# 5 . . 52.215-8 ORDER OF PRECEDENCE-UNIFORM
CONTRACT FORMAT (OCT 1997)

Any inconsistency in this solicitation or contract shall be
resolved by giving precedence in the following order:

- (a) The Schedule (excluding the specifications).
- (b) Representations and other instructions.
- (c) Contract clauses.
- (d) Other documents, exhibits, and attachments.
- (e) The specifications. . . AM# 5

(App. supp. R4, tab 29 at first and last pages) The contract also contains the FAR 52.233-1, DISPUTES (DEC 1998); FAR 52.236-21, SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (FEB 1997); and the SCR-5, Department of Defense FAR Supplement (DFARS) 252.236-001, CONTRACT DRAWINGS AND SPECIFICATIONS (AUG 2000), clauses (R4, tabs 18-20).

By letter dated 15 December 2003 to then Administrative Contracting Officer (ACO) Ken L. Larson, DP/G submitted RFI No. 1211, which it described as “layout/wall type issues [emphasis added]” (R4, tab 17 at 116, 119). The RFI included several inquiries and attached portions of drawings. “Sheet # 2” is at issue (*id.* at 121). The first inquiry pertaining to Sheet # 2 was:

1) Length of wall may be determined by equipment size, if not please provide dimension. *Please provide wall type the equipment penetrates at north and south end of equipment.* [Emphasis added]

(*Id.* at 119) ACO Larson’s 27 January 2004 response stated that it was provided per FAR 52.236-21 and SCR-5 as a clarification, at no increase in contract cost or time (R4, tab 12 at 75-76). He forwarded the A&E’s response that “[w]all length does depend on equipment size[.] S0440 is installed in modular walls as per TS 11710, 2.6.4.1.b.” (*id.* at 78; gov’t br., ex. 1, ¶ 4).

Specifications Division 11, “EQUIPMENT,” at TS 11700, “MASTER CASEWORK AND EQUIPMENT SCHEDULE,” lists JSN S0440 as “Sterilizer, Steam, vac . . .,” and JSN S1100 as “Modular Wall;” describes both as category A equipment; and refers to TS 11710 with respect to both items (R4, tab 21 at 137, 150). Category A Equipment, per TS 11700, subpart 1.1.1, is “CONTRACTOR FURNISHED AND CONTRACTOR INSTALLED” (*id.* at 136). The master casework and equipment schedule does not specify the number of modular walls to be installed.

TS 11710, “WARMING CABINETS, STERILIZERS AND ASSOCIATED EQUIPMENT” (R4, tab 22 at 155), provides in part at section 1.2, “SUBMITTALS:”

Drawings for pass-through gas and steam sterilizers, aerator and cart washers *shall show modular wall layouts* and their coordination and with building layouts. *All modular wall dimensions shall be field verified before fabrication.* [Emphasis added]

(*Id.* at 157-58) TS 11710 further provides in part:

2.6.2 Item S1100 – Modular Wall

Modular wall shall be designed and fabricated from 18 gauge stainless steel to form an enclosure that conceals from view the equipment body, wiring, piping, other appurtenances, *and*

to confine steam, vapor and excessive heat in an enclosed area. Walls shall . . . include opening for equipment, access doors, louvered panels and extend floor to finished ceiling.

(*Id.* at 162-63)

2.6.4 Steam Sterilizers – S0165, S0215, S0440, S4400

2.6.4.1 Steam Sterilizers – General Types

. . . .

b. Prevacuum steam sterilizers Item *shall be installed within modular walls as indicated on drawings.* [Emphasis added]

(*Id.* at 164)

2.6.4.3 Sterilizers

. . . .

c. S0440: Sterilizer, Steam Vacuum: Item shall be a prevacuum sterilizer and have two hinged, power operated doors *recessed through two walls.* [Emphasis added]

(*Id.* at 166)

Drawing No. A16.204, Equipment/Furniture Plan, Level 2 – Area 204, labels the wall at the north end of room 204-03, between room 204-03 and 210-01, as type S1100, a stainless steel modular wall, and depicts it with a double line. Drawings Nos. A18.201 and A18.202, Interior Elevations, also so label the wall looking north and south. This is the only S1100 modular wall that appellant and ISEC acknowledge is in the contract. (*See above* and app. supp. R4, tab 40 (Capone aff.), ¶¶ 2, 5, tabs 92, 98, 99)

The walls at issue are at the south end of room 204-03, between that room and room 205-04 (app. supp. R4, tab 38, ¶ 10, tab 93). Drawing No. A16.205, Equipment/Furniture Plan, Level 2 – Area 205, shows room 204-03 in part and room 205-04, south of it. Between the rooms, it shows double lines, unlabeled, on both sides of, and enclosing, two sets of equipment labeled “S0440”, the prevacuum steam sterilizers. (App. supp. R4, tab 93) DP/G’s coordination drawings also identify the

equipment at that location as “S0440” (supp. R4, tab 120 at 255-256). Drawing No. A18.201, which shows north and south interior elevations for the sterilizers between rooms 204-03 and 205-04, does not include wall type designations (app. supp. R4, tab 97).

Appellant “does not dispute that wall assemblies are shown separating rooms 204-03 and 204-05 [sic]” (compl. ¶ 63 (appellant otherwise correctly identifies the room as “205-04” throughout its complaint)). The parties agree that the drawings do not show the type of wall to be installed (compl., answer ¶ 63; gov’t br. at 2, proposed findings Nos. 2, 3; gov’t reply at 5). Aaron Capone, a DP/G project engineer, opines that the unlabeled double lines “could represent a wall of an unspecified type or . . . a wall or equipment item to be supplied and installed by others as part of a follow-on contract” (app. supp. R4, tab 40, ¶ 5). There is no evidence that DP/G inquired of the Corps prior to entering into the contract about the type of wall to be constructed, or that ISEC so inquired of either DP/G or the Corps prior to its subcontract bid. There is no persuasive evidence that the A&E deliberately omitted the wall type from the drawings or that they depicted a wall or equipment to be installed by a subsequent contractor.

Appellant directs us to Drawing No. A8.205, Floor Plan, Level 2 – Area 205, which labels the walls on the east and west sides of room 205-04 as types D13 and D15, which are gypsum walls (app. supp. R4, tabs 94, 96). However, those walls do not enclose S0440 steam sterilizers. Appellant also notes that, between rooms 239-09 and 239-10, the drawings designate a D13 partition. However, the partition, and the sterilizer located there, differ from those at issue. (*Id.*, tab 40, ¶ 3, tabs 95, 96)

By letter dated 29 November 2005 to then ACO Rolf O. Ness, DP/G requested a \$52,655 change order for added modular walls, based upon a \$44,267 ISEC proposal. In a 10 January 2006 letter to the ACO, DP/G referred to its 29 November letter and indicated that it would not proceed with the walls unless so directed. (R4, tabs 14, 15 at 92, 93, 96) ACO Ness responded by letter of 11 January 2006, noting that DP/G had referred to its 29 November letter by an incorrect identification number, but that if it were referring to RFI No. 1211, then the Corps’ prior response had been a no cost clarification of wall dimensions and types and “[i]t did not add walls” (R4, tab 13). By letter of 13 January 2006, DP/G acknowledged that it had misidentified its 29 November letter and enclosed another copy of that letter and change order request (R4, tab 12).

In February 2006, ACO Ness asked Mark Wika, a Corps employee from another district, temporarily assigned to the Bassett Hospital project, to review the extensive change request log and respond to unanswered letters. Mr. Wika prepared an internal Corps change request form concerning DP/G’s 13 January 2006 letter and drafted a letter reflecting acceptance of DP/G’s change request. However, the form merely incorporated

all of DP/G's RFI No. 1211 questions, and the Corps' responses, and did not contain a rationale for accepting DP/G's change request. (Supp. R4, tab 116; app. supp. R4, tab 45; gov't br., ex. 2 (Ness aff.), ¶¶ 9-11, 14) By letter to DP/G of 23 February 2006, substantially as drafted by Mr. Wika, ACO Ness advised that its change order request "has been determined to have merit" and stated that a request for proposal would follow (R4, tab 11; app. supp. R4, tab 46).

After an internal Corps review that ultimately reaffirmed its initial position that the modular walls were not a contract change, ACO Ness wrote to DP/G on 7 June 2006, requesting a proposal, largely concerning RFI No. 1211 dimension issues (R4, tab 9; app. supp. R4, tabs 48, 52 at 3 of 3, tab 112 at 221, tab 113 at 227). He stated: "Please note that your previous proposal . . . incorrectly assumed that there were additional modular walls being installed in Rooms 204-03 and 205-04. These walls are required by contract." (R4, tab 9 at 61) By letter of 16 June 2006, DP/G stated that the Corps' reversal of position and lack of direction had seriously impacted work completion. The ACO's 21 June 2006 response denied any reversal and alleged that the 23 February 2006 "merit" letter only covered dimensions and other of the RFI items. He directed DP/G to install the walls per the Corps' two original responses that they were required. (R4, tabs 7, 8)

By letter of 18 August 2006, to then ACO Jacqueline Fabrizzio (*see* R4, tab 5), DP/G submitted another change order request, for \$58,278, pertaining to the modular walls (app. supp. R4, tab 58). On 22 August 2006 the A&E opined to the Corps that the drawings were clear that there were partitions between the sterilizers at issue, and the specifications called for modular walls to be installed at the sterilizers (app. supp. R4, tab 59 at 1). Appellant alleges a different design intent, citing an equipment and casework schedule dated 17 months prior to contract award that listed only one such wall, at room 210-01 (app. supp. R4, tab 121), but which is not part of the contract (gov't objs. to app's second R4 supp. at 1 (unrebutted)); and a portion of a 10 December 2001 government project estimate that includes only one such wall (app. br. at 20 and ex. 1). We find this evidence insufficient to establish the design intent alleged by appellant.

On 12 October 2006 DP/G submitted an \$81,929 CDA claim to the ACO. Its appended change order request did not seek a time extension but noted that "Schedule Effect" was "To be determined" (R4, tab 6 at 45). It also noted that its pricing was based upon subcontractor quotes and included any qualifications in those quotes (*id.*). The claim included ISEC's 17 August 2006 proposal for \$46,491, which stated that it was based solely on direct costs and did not include any amount for delays, disruptions, extended overhead or other impact costs. It added: "This right is expressly reserved and notice of potential claim made, for any of these and related items of cost prior to any final payment under this Contract." (*Id.* at 49) On 23 January 2007 CO Donna L. West issued

a final decision denying DP/G's claim (R4, tab 1). On 16 February 2007, appellant timely appealed to the Board.

On 19 March 2007, ISEC notified DP/G that it had finished the walls (app. supp. R4, tab 67). That day DP/G wrote to the ACO seeking \$99,479 in "updated claim costs," stating that they now included actual construction costs and ISEC's delay costs; that DP/G's delay costs were not included; and it reserved the right to include them "in the future" (supp. R4, tab 101 at 184). Of the increased amount, ISEC sought \$43,234 for wall installation and \$31,132 of "extended home office overhead for the delay associated with this change," for a total of \$74,366 (*id.* at 188). There has been no CO's decision on the delay claim and no appeal from a deemed denial of the claim.

DISCUSSION

Contract Requirement for Modular Walls for S0440 Sterilizers

Appellant alleges that, per design intent, the modular walls at issue were not part of its contract and the government's interpretation is unreasonable. Secondly, it contends that, to the extent there is more than one reasonable interpretation, the contract is ambiguous and must be construed against the government, and, in that connection, the Order of Precedence clause places the specifications last in importance. The government contends, *inter alia*, that appellant's interpretation is unreasonable; despite the drawings' omission of a wall label, the contract clearly required the modular walls; the Specifications and Drawings for Construction, and the Contract Drawings and Specifications, clauses apply; if there is an ambiguity, it is patent; and appellant failed to meet its duty to inquire, and to prove reliance upon its current interpretation.

A contract is to be read as a whole, giving reasonable meaning to all of its parts. It is ambiguous if it is susceptible of more than one reasonable interpretation. It is patently ambiguous if the ambiguity should be apparent to a reasonable person in the claimant's position. If there is a patent ambiguity, inconsistency or mistake, the contractor must inquire about it prior to submitting its bid or proposal. If the ambiguity is latent, the contractor's interpretation will prevail, if it proves that it relied upon it when it entered into the contract. A subcontractor's interpretation will be imputed to the contractor if it proves that the subcontractor relied upon it in its bid, which the contractor incorporated, or that the subcontractor's price was comparable to that of others, which the contractor's bid or proposal reflected. *Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997); *Newsom v. United States*, 676 F.2d 647, 649 (Ct. Cl. 1982); *M.A. Mortenson Co.*, ASBCA Nos. 53146 *et al.*, 05-1 BCA ¶ 32,846 at 162,770-71; *M.A. Mortenson Co.*, ASBCA Nos. 53105 *et al.*, 04-2 BCA ¶ 32,713 at 161,845-46.

The specifications and drawings, reasonably read as a whole, require modular walls at the S0440 sterilizers. TS 11700 classifies the S0440 steam prevacuum sterilizers and the modular walls as contractor-installed equipment and cross references TS 11710, which states that drawings for steam sterilizers “shall show modular wall layouts” (subpart 1.2). Modular walls are to be fabricated from stainless steel to confine steam in an enclosed area (subpart 2.6.2). S0440 sterilizers are prevacuum steam sterilizers with doors “recessed through two walls” (subpart 2.6.4.3c.). Prevacuum steam sterilizers are to be “installed within modular walls as indicated on drawings” (subpart 2.6.4.1b.).

Drawing No. A16.205 shows rooms 204-03 and 205-04 with unlabeled double lines between them enclosing two sets of S0440 sterilizers. Appellant’s coordination drawings also so identify the equipment at that location.¹ It acknowledges that “wall assemblies” are shown separating the rooms, but alleges that a reasonable interpretation is that the designer intended the walls to be installed later by others because wall type is not indicated. We found that there is no persuasive evidence that the designer deliberately omitted the wall type from the drawings or that they depict walls to be installed by a subsequent contractor. Indeed, although ISEC’s estimator testified in his affidavit that he interpreted the contract to identify only one S1100 modular wall, appellant and/or ISEC recognized that walls were required at the location in question. In RFI No. 1211, appellant requested that the Corps “provide wall type the equipment penetrates at north and south end of equipment.” While the drawings omit the wall type designation, they depict S0440 sterilizers at the location in question, thus reasonably indicating that modular walls were required there.

In sum, read reasonably as a whole, appellant’s contract required that it install modular walls at the location of the S0440 prevacuum steam sterilizers. Because the contract is not ambiguous we do not reach the issues of patent ambiguity, reliance, duty of inquiry, the doctrine of *contra proferentem*, or the parties’ other contentions.

Lack of Jurisdiction over Delay Claim

The CDA requires a contractor to submit its claims to the CO in writing for decision, and accords the Board jurisdiction to decide appeals from CO’s decisions. 41 U.S.C. §§ 605(a), 607(d). Appellant’s delay claim was not part of its contract change claim. In fact, any delay and impact costs were not quantified and were specifically

¹ The government contends, without citation to evidence, that these are the only S0440 sterilizers in the project and TS 2.6.4.1b.’s modular wall requirement for such sterilizers would be meaningless if not intended to pertain to them (gov’t reply at 7-8, 12-13). This contention is reasonable but, due to the lack of evidentiary support, we have not relied upon it.

excluded. The current delay claim on behalf of ISEC was raised after the CO's decision on the change claim, while this appeal was underway. There has been no CO's decision on the delay claim and appellant has not appealed from any deemed denial. Thus, we lack jurisdiction to entertain the delay contentions.

DECISION

Appellant's contentions concerning alleged delays to its subcontractor's work are dismissed without prejudice for lack of jurisdiction. The appeal before us is denied.

Dated: 23 October 2007

CHERYL L. SCOTT
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. 55806, Appeal of Dick Pacific/GHEMM, JV, rendered in conformance with the Board's Charter.

Dated:

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