

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
Strand Hunt Construction, Inc.) ASBCA Nos. 55671, 55813
)
Under Contract No. W911KB-04-C-0008)

APPEARANCE FOR THE APPELLANT: Mr. Rollie E. Hunt
President

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OPINION BY ADMINISTRATIVE JUDGE DICKINSON

These appeals arise from a contract awarded to Strand Hunt Construction, Inc. (SHC) by the Corps of Engineers (“Corps” or government) for the design and construction of a Joint Security Forces Complex at Eielson AFB, AK. A one-day hearing took place in Seattle, WA on 7 August 2007.

FINDINGS OF FACT—General

1. The Corps entered into Contract No. W911KB-04-C-0008 with SHC on 27 February 2004 for the design and construction of a Joint Security Forces Complex at Eielson AFB, AK in the amount of \$14,139,500. The Notice to Proceed was issued on 2 March 2004, making the contract completion date 1 July 2005. The contract completion date is in dispute in a separate appeal not to be decided here. (ASBCA No. 55671 (55671), R4, tab 1 at 4; ASBCA No. 55813 (55813), R4, tab 25)

2. The contract contained the following FAR clauses: 52.233-1, DISPUTES (JUL 2002); 52.236-21, SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (FEB 1997); and, 52.243-4, CHANGES (AUG 1987) (55671, R4, tabs 12, 13, 14; 55813, R4, tabs 27, 28, 29). The Specifications and Drawings for Construction clause, FAR 52.236-21, provided:

(a) ... Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In case of discrepancy in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Any adjustment by the Contractor without such a determination shall be at its own risk and expense.

(55671, R4, tab 13; 55813, R4, tab 28)

3. The following Special Contract Requirements (SCR) were included in the contract:

SCR-5 DRAWINGS AND SPECIFICATIONS (Aug 2000)

....

(b) The Contractor shall –

(1) Check all drawings furnished immediately upon receipt;

(2) Compare all drawings and verify the figures before laying out the work;

(3) Promptly notify the Contracting Officer of any discrepancies;

(4) Be responsible for any errors that might have been avoided by complying with this paragraph (b); and

....

(d) Omissions from the drawings or specifications or the misdescription of details of work that are manifestly necessary to carry out the intent of the drawings and specifications, or that are customarily performed, shall not relieve the Contractor from performing such omitted or

misdescribed details of the work. The Contractor shall perform such details as if fully and correctly set forth and described in the drawings and specifications.

(55671, R4, tab 15; 55813, R4, tab 31)

SCR-41 DESIGN BUILD CONTRACT – ORDER OF PRECEDENCE

(a) The contract includes the standard contract clauses and schedules current at the time of the contract award. It entails (1) the solicitation in its entirety, including all drawings, cuts, illustrations, and any amendments, and (2) the successful offeror’s accepted proposal. The contract constitutes and defines the entire agreement between the Contractor and the Government. No documentation shall be omitted which in any way bears upon the terms of that agreement.

(b) In the event of conflict or inconsistency between any of the provisions of this contract, precedence shall be given in the following order:

- 1) Betterments: Any portions of the accepted proposal which both conform to and exceed the provisions of the solicitation.
- 2) The provisions of the solicitation. (See also Contract Clause: SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION.)
- 3) All other provisions of the accepted proposal.
- 4) Any design products including, but not limited to, plans, specifications, engineering studies and analyses, shop drawings, equipment installation drawings, etc. These are “deliverables” under the contract and are not part of the contract itself. Design products must conform with all provisions of the contract, in the order of precedence herein.

(55671, R4, tab 16; 55813, R4, tab 32)

SCR-44 RESPONSIBILITY OF THE CONTRACTOR FOR DESIGN

(a) The Contractor shall be responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and any other non-construction services furnished by the Contractor under this contract. The Contractor shall, without additional compensation, correct or revise any errors or deficiency in its designs, drawings, specifications, and other non-construction services.

(b) Neither the Government's review, approval or acceptance of, nor payment for, the services required under this contract shall be construed to operate as a waiver of any rights under this contract, or of any cause of action arising out of the performance of this contract, and the Contractor shall be and remain liable to the Government in accordance with applicable law for all damages to the Government caused by the Contractor's negligent performance of any of the services described in paragraph (a) furnished under this contract.

(c) The rights and remedies of the Government provided for under this contract are in addition to any other rights and remedies provided by law.

(55671, R4, tab 17; 55813, R4, tab 32)

4. RFP Specification (Spec.) § 01010, DESIGN REQUIREMENTS, stated in part:

2.4.3 Designer Responsibility

- A. The Design-Build contractor's Architect of Record shall be responsible for the design of the life safety and architectural systems for the building....

2.4.4 Submittals

- A. Submittals and shop drawings shall be prepared by suppliers and submitted to the contractor and architect of record for review and approval. Provide copies of final approved submittals bearing the contractor's and

architect of record's review stamps to the Corps of Engineers.

(55813, R4, tab 33)

5. SHC was an experienced design/build contractor (55813, R4, tab 26; app. supp. R4, tab 5; tr. 190-91). SHC's architect of record was Design Alaska, its subcontractor who had designed "many projects" at Eielson AFB (55813, R4, tab 26; tr. 113).

6. Design Alaska's project manager on this project, John Poirrier, had 20 years project management experience in the Army Corps of Engineers plus more than 10 years project management experience with Design Alaska (55813, ex. A-59 at 4-9). He knew that preparation of a proposal responsive to a Corps design/build RFP required "a certain amount of preliminary design work be done to allow the design builder" to get subcontractors, estimators and others "lined up" (55813, ex. A-59 at 12). It was SHC's responsibility as the design/builder to deal directly with the suppliers and manufacturers (55813, ex. A-59 at 23-24). As Mr. Poirrier testified:

[T]he process is intended to allow considerable latitude on the part of the design builder in making some of these translations and interpretations....[the] whole reason for doing a design build [is] because...the Corps is relying on the design builder to resolve many of the things that were not resolved prior to the advertisement of the RFP.

So there remain a lot of unknowns,...a lot of questions that don't get answered until the contract is awarded. We go through the design-build process, or go through the full design process, actually start identifying materials and start getting things lined up and committed...after contract award.

....

So we'll go into the contract with...65 percent unknown...and maybe only 35 percent known.... With the contractor taking all of the...risk of the unknown...portions of the design.

(55813, ex. A-59 at 18-19)

7. SHC was aware that it could provide input back to the Corps if and when SHC (or Design Alaska) identified problems with the RFP requirements prior to submission of its proposal (tr. 79-80). SHC also knew that it and Design Alaska could identify such

problems after contract award during the design submittal phases (tr. 80-82). While SHC was aware of the pre-award clarification of the term “sealed concrete” as it related to floors not involved in these appeals (finding 14), neither SHC nor Design Alaska sought clarification or identified to the government as problems the window or floor finish issues raised in these appeals.

8. Spec. § 01012, ¶ 1.1(b) provided:

Design submittals must comply with all requirements stated in this RFP. In the event of any conflict between the RFP criteria and the Contractor’s submittals, the RFP criteria will govern unless there is a written and signed agreement between the Contractor and the Contracting Officer waiving a specific requirement.

(55671, R4, tab 1 at 7) We find that this contract provision put SHC on notice that requests for waivers were contemplated by the parties as part of the contract administration process.

ADDITIONAL FINDINGS OF FACT

ASBCA No. 55671 (floor finishes)¹

9. Seven areas of the facility were identified as “UTILITY” areas in the Room Criteria Sheets (RCS) Room Tabulation in the contract (R4, tabs 20, 21). The RCS Room Tabulation was page 256 of 256 in Spec. § 01010, Design Requirements (R4, tab 1 at 7, tab 21). Four of those utility areas are at issue in this appeal: the Electrical Generator/Electrical Room (Room 71), the Fan Room (Room 72), the Mechanical Room (Room 73) and the Stairs to the Fan Room (Room 74) (R4, tab 4; exs. A-5, -8).

10. The RCS (RFP pages 236, 237, 238 and 239) for each of the four utility areas at issue in this appeal identify the floor finish as “sealed concrete” (R4, tab 20).

11. The contract does not contain a definition of the term “sealed concrete” (tr. 133). However, Spec. § 01010, ¶ 2.4.15, Interior Finishes, provided the following requirement for concrete in utility areas not receiving one of the other specified finishes or flooring listed in ¶ 2.4.15:

¹ All documentary record citations in this section are to those received in ASBCA No. 55671 unless otherwise indicated.

K. Concrete Slab Finishes

1. Utility areas not receiving finish flooring; see Room Criteria Sheets for locations – system descriptions are based on Sherwin Williams products and application recommendations; equal product of another manufacturer is acceptable
 - a) Coating Vehicle – moisture cured urethane
 - b) Coating Finish – gloss
 - c) Surface Preparation – SSPC-SP13 NACE 6
 - d) Topcoat – 2 coats ArmorSeal Rexthane I Floor Coating with slip-resistant additive.

(R4, tab 19)

12. The RCS for three of the seven utility areas in the contract identify non-concrete floor finishes of either vinyl tile or raised computer access flooring (tr. 162-65). Because the final finished floors in these three utility areas were not exposed concrete, Spec. § 01010, ¶ 2.4.15.K.1 (finding 11) did not apply to them. The floors of the four rooms at issue were the only utility floors in the entire project that received “sealed concrete” instead of some other specified floor finish (tr. 163-64, 180).

13. Spec. § 01010, ¶ 2.5.5.F, Concrete, required that a “Non-slip finish shall be applied to slabs exposed in final construction” (ex. A-43). This non-slip finish was a component of the finish specification at ¶ 2.4.15.K.1.d (finding 11).

14. Prior to SHC submitting its proposal, clarification was requested by an unknown potential bidder relating to the term “sealed concrete” stated on the RCS for Mobility Bays and Parking Garage (RFP at 132, 166, 215) and the Spec. § 01010, ¶ 2.4.15.K.2 requirement for “Epoxy Floor Paint.” The government responded by issuing Amendment R0004 to the RFP changing the RCS for those areas to “epoxy.” (Ex. A-40; tr. 156-58) There is no evidence that after receiving this amendment (finding 7) SHC requested clarification of the “sealed concrete” requirement in ¶ 2.4.15.K.1 which related to utility room areas (RFP at 236, 237, 238, 239) which are the subject of this appeal.

15. SHC has maintained throughout the course of this appeal that SHC’s proposal included a “typical” concrete sealer “called for and used in most projects” (tr. 130, 133). SHC’s proposal did not include the Rexthane epoxy system or equal contained in Spec. § 01010, ¶ 2.4.15.K.1 (R4, tab 4). Nevertheless, the Architectural Narrative of SHC’s proposal, prepared by Design Alaska, stated that “Interior finishes are as indicated in the Room Criteria Sheets and the specific finish requirements of 01010” (R4, tab 22).

16. On 9 May 2005, over a year after contract award, SHC sent a letter to the government stating “We have made another thorough review of our design documents” and “We have determined that the RFP is unclear in three...areas and should be changed by the Government, as follows.” One of the items listed was:

RFP section 2.4.15.K.1 requires painted floors in rooms 71-75. The room criteria sheets call these to be concrete sealer. We bid and are installing sealed concrete in these areas.

(R4, tab 9) The letter further stated that “[t]hese are all no cost, no time changes/clarification to the RFP” (emphasis in original) (*id.*; tr. 135-38).

17. On 16 May 2005 the government responded by letter to SHC that the finish required for concrete in utility areas not receiving finish flooring was “RFP section 2.4.15.K. Concrete Slab Finishes.” The letter further stated:

RFP section 2.5.5 Concrete F. Non slip finish shall be applied to slabs exposed in final construction.

The room criteria sheets simply state sealed concrete. The sealer is the above mentioned paint system, and must be installed to be in compliance with the RFP. If the painting system is not installed and a suitable non-slip surface is not provided then the Government will pursue an equitable adjustment for all cost associated with installing the desired product.

(R4, tab 8)

18. In a 24 May 2005 letter, Design Alaska, SHC’s architect of record, opined that it had not matched up specifications for utility room floor finishes because it “did not interpret that the listed spaces were utility rooms” based on what it claimed was a dictionary definition (ex. A-38). However, the RCS for these rooms were expressly marked “UTILITY” in bold letters at the top of each page (R4, tabs 20, 21).

19. An email dated 27 May 2005 from the government to SHC gave “Concrete Floor finish direction:”

Rollie: please take this email as direction from the Government to follow RFP requirements for concrete finishing; concrete floors in Utility Areas are to be finished in

accordance with 2.4.15K.1 and Mobility Bays are to be finished in accordance with 2.4.15K.2 of the RFP.

(Ex. A-20) SHC responded by 31 May 2005 email requesting:

Please could you provide the following clarification to your direction below. What rooms does the Government believe are the “utility areas” that you are directing SHC to apply the paint system to as specified in 2.4.15.K.1. We cannot proceed per your direction without the clarification so please get it to us asap.

(Ex. A-21)

20. On 1 June 2005 SHC directed its painting subcontractor to apply the Rexthane product to “#71 Elec/Generator room, #72 fan room, #73 Mechanical room, #74 stairs to the fan room” (ex. A-33).

21. On 2 June 2005 the government provided by email attachment a list of 13 rooms including the 4 rooms at issue in this appeal (exs. A-22, -23). The following morning, SHC professed confusion as to whether all 13 rooms listed required the finish specified in 2.4.15.K.1 (ex. A-24).

22. On 3 June 2005, the same day as SHC’s professed confusion, the government provided the following clarification by email:

Mike’s list shows all the rooms with concrete floors requiring some sort of treatment per 2.4.15[.]K.1 or 2.4.15[.]K.2. You may also want to reference the room tabulation sheets pgs. 255 and 256. The room tabulation sheets are a consolidated listing of all rooms and specifically identify Utility areas, Mobility areas, and Parking areas. These designations (“Utility”, “Parking”, and “Mobility”) and associated rooms are all cross-referenced on the room criteria sheets in the upper right hand corner such that there is virtually no room for confusion. Utility areas receive treatment per 2.4.15[.]K.1[.] Mobility and Parking areas receive treatment per 2.4.15[.]K.2. The treatments are required unless a specific room criteria sheet calls for something else. Mike’s list actually distills out the rooms in these categories that receive something different.

(Ex. A-25) Within two hours, SHC again professed to be confused by the clarification and requested “clear direction” (ex. A-26).

23. In an email dated 6 June 2005, the government directed SHC to apply the Sherwin Williams or equal paint system in Electrical Generator/Electrical Room No. 71, Fan Room No. 72, Mechanical Room No. 73 and the stairs to the Fan Room No. 74 (ex. A-27). SHC acknowledged receipt of the direction via email the same day and stated “That takes care of these rooms” (R4, tab 7).

24. A month later on 7 July 2005 the parties met and SHC again requested clarification of the contract term “sealed concrete.” By letter dated 11 July 2005 the government reiterated that “Concrete Slab Finishes shall be completed per the Contract Documents and the Interior Finishes Schedule, Section 01010.2.4.15.” After quoting ¶ 2.4.15.K.1, Concrete Slab Finishes, the government concluded that the specified Sherwin Williams or equal products were the intended concrete floor finish noted on the Room Criteria Sheets as “sealed concrete.” SHC had come to the conclusion on 9 May 2005 that a painted surface was required by ¶ 2.4.15.K.1 (finding 16). The government further stated, “This item is provided as a clarification and shall not result in a cost increase to the Government or an extension of contract time.” (R4, tab 5)

25. On 21 February 2006, SHC requested an equitable adjustment of the contract price in the amount of \$25,173 for the cost of installing the Rexthane Epoxy system to the concrete floors in the four utility areas at issue (R4, tab 4).

26. On 30 June 2006 SHC submitted a certified claim in the amount of \$25,173 for the cost of installing Rexthane Epoxy to certain concrete floors and requested a contracting officer’s final decision (R4, tab 3).

27. On 27 October 2006 the contracting officer issued a final decision denying SHC’s claim for costs associated with installing an epoxy finish on certain concrete floors (R4, tab 1).

28. SHC’s 29 November 2006 appeal from the contracting officer’s final decision to the Armed Services Board of Contract Appeals was docketed as ASBCA No. 55671 on 6 December 2006 (R4, tab 2).

DECISION – ASBCA No. 55671

SHC contends the contract was ambiguous as to the definition of the finish to be applied to the concrete floors in four utility areas (app. br. at 3, 6). SHC further contends that such an ambiguity was not patent. The government argues the contract was not ambiguous and was susceptible to only one reasonable interpretation of the term “sealed concrete.”

The determination of whether contract ambiguity exists is a question of law. *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575 (Fed. Cir. 1993) (reversed

in part on other grounds). A contract is ambiguous only if it is susceptible of two different and reasonable interpretations, each of which is found to be consistent with the contract language. *Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986). When the Board "steps into the shoes of a reasonable and prudent business person, aware of the situation" and a "plain reading of the contract as a whole seems to yield only one reasonable interpretation," there is no ambiguity. *Id.* at 706.

It is also well-established that a contract must be construed as a whole to give meaning to all of its provisions. *Julius Goldman's Egg City v. United States*, 697 F.2d 1051 (Fed. Cir. 1983).

A contract's meaning must be gleaned from the four corners of the document and any interpretation which renders any of the terms meaningless, inexplicable, without purpose or useless is perforce unreasonable. *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972 (Ct. Cl. 1965); *Reflectone, Inc.*, ASBCA No. 34891, 89-3 BCA ¶ 21,962.

Western States Management Services, Inc., ASBCA No. 37504 *et al.*, 92-1 BCA ¶ 24,663 at 123,036.

SHC was obligated under the contract to design and construct the Joint Security Forces Complex in accordance with the terms of the contract as a whole, taking into account all contract requirements. The RCS and the RCS Room Tabulation in the contract identified the floor finishes to be installed in the four utility areas at issue as "sealed concrete" (finding 10). SHC contends the contract provided no definition of "sealed concrete" therefore leaving it to SHC's interpretation of the application of a "common" or "typical" clear sealer.

However, in Spec. § 01010, Design Requirements, ¶ 2.4.15, Interior Finishes, the contract provided a list of eleven floor finishes, one of which was required to be installed in each location throughout the project. Included in that list was:

K. Concrete Slab Finishes

1. Utility areas not receiving finish flooring; see Room Criteria Sheets for locations – system descriptions are based on Sherwin Williams products and application recommendations; equal products of another manufacturer is acceptable
 - a) Coating Vehicle – moisture cured urethane
 - b) Coating finish – gloss
 - c) Surface Preparation – SSPC-SP13 NACE 6

- d) Topcoat – 2 coats ArmorSeal Rextthane I Floor Coating with slip-resistant additive.

(Finding 11) This was the only interior finish specified for concrete in utility areas not receiving one of the other 10 finishes or flooring identified in ¶ 2.4.15. Contract Spec. § 01010, Design Requirements, ¶ 2.5.5, Concrete, further required that a “Non-slip finish shall be applied to slabs exposed in final construction” (finding 13).

In SHC’s proposal, prepared by its design subcontractor, Design Alaska, SHC assured the government that “Interior finishes are as indicated in the Room Criteria Sheets and the specific finish requirements of 01010.” Within the four corners of the contract were two requirements for a specific type of sealer for concrete, *i.e.*, ¶¶ 2.4.15.K.1 and K.2 (findings 11-12, 14, 16, 19, 22). There was nothing in the contract to support SHC’s choice of another type of sealer. SHC’s interpretation of “sealed concrete” as permitting a non-specified “typical” sealer rendered ¶ 2.4.15.K.1 meaningless and is therefore unreasonable.

We find that the contract is not ambiguous because its express terms provided one and only one reasonable interpretation of the requirement for the sealing of concrete floors in utility areas not receiving one of the other designated floor finishes.

ASBCA No. 55671 is denied.

ADDITIONAL FINDINGS OF FACT

ASBCA No. 55813 (windows)²

29. RFP § 01010, DESIGN REQUIREMENTS, stated in part:

2.4.8 Doors and Windows

A. Exterior Aluminum Windows, with the following performance requirements

1. Force Protection Glazing – All exterior glazing shall meet the minimum resistance standards in UFC 4-010-01 DoD Minimum Antiterrorism Standards for Buildings.

....

² All documentary record citations in this section are to those received in ASBCA No. 55813 unless otherwise indicated.

8. Thermal Performance – ASTM C 236, minimum u-value of 0.65 and a minimum crf of 67. Thermal break fixed or casement frames, meeting a design STC of 50 per ASTM E 90 and a field test STC 39 per ASTM E 336.

(R4, tab 33) There were a total of 14 performance requirements contained in ¶ 2.4.8.A (*id.*). There was nothing in them to specify a particular size of window or other characteristics such as location and installation method which were left to SHC and Design Alaska to decide in the formulation of their design of the Joint Security Forces Complex (ex. A-58 at 65). Nothing in the contract indicated or promised an existing ready-made window, nor were any particular manufacturers identified (ex. A-59 at 47; tr. 107-08). In response to questioning by SHC, Roger Hess, the government civil engineer who analyzed SHC's claim testified:

This is a design/build project. These are performance requirements.... that any window manufacturer could have engineered, designed a window, built it.

Your particular architect, Alaska Design [sic], had vast experience in the arctic with windows. I don't know if they had experience with these 14 points, but a contractor and a design professional in an arctic environment, looking at that particular spec, would have concluded this is a custom window and we need to go to a window manufacturer and have a window designed and engineered.

If you got one off the shelf, that's great, but the spec does not state or guarantee that you can purchase one off the shelf.

(Tr. 111)

30. SHC's proposal addressed windows in an Architectural Narrative section in which it stated:

Force protection will be provided in conformance to UFC 4-010-0, DoD Minimum Antiterrorism Standards for buildings.

....

Windows will be thermally broken extruded aluminum, casement and fixed windows with insulating glass. Frames and glazing will meet the Force Protection requirements of

UFC 4-010-01. Windows shall be equal to the basis of design window specified in 01010 2.4.8.A.

(R4, tab 34 at 000104, 000106) These design elements were reiterated in SHC's 65% and 95% design submittals, dated 28 April 2004 and 28 June 2004, respectively (R4, tabs 37, 38).

31. Design Alaska authored the specifications for the building of the project, including the force protection window specification (R4, tab 18; ex. A-59 at 79). In the 95% design submittal, dated 28 June 2004, Design Alaska's specification 1.2.F required a minimum CRF (condensation resistance factor) of 67 (R4, tab 38 at 000146).

32. Alaska Glass & Door (AG&D) was the subcontractor who worked with SHC on the window portion of its proposal (R4, tab 10; ex. A-57). When preparing its proposal "Strand Hunt Construction could not get a firm bid from any Manufacturer.... In order to have a reasonable amount for the supply and install of these windows at bid time, we therefore asked Alaska Glass & Door to provide a safe budget number based upon typical labeled force protection type windows used on Military bases in Alaska. They are an Alaska contractor and would know what the reasonable price was based upon their extensive experience in Military work." (R4, tab 10 at 000048) AG&D based its "ballpark" estimate on a window it had provided for a previous silo project performed by SHC at Eielson AFB (ex. A-57 at 10-14, 19-20, 36). AG&D did not think it would have mattered much whether it saw the RFP at the time of its estimate. Mr. Tim Thornock, the owner of AG&D, testified:

I mean, it's a complex process. It just is not – budgeting them numbers and working a design/build project takes time to work through.

You know, you have a designer who thinks he understands the project and as questions come up, he starts learning. And then he figures out that what he's drawn doesn't necessarily work or match, and the process continues. You have slight shifts of course with products and time frame and design.

(Ex. A-57 at 14)

33. SHC's project manager testified that he would normally factor in about 14 weeks as the lead time for ordering windows on any project (ex. A-60 at 36). He estimated that, based on the March 2004 date of the Notice to Proceed in this case, he would normally talk to the window supplier in early April 2004, expect window

production to be complete in mid-July and windows installed sometime in August 2004 (ex. A-60 at 79).

34. However, it was not until 9 July 2004 that SHC first communicated with Custom Window Co. about a “furnish and install price.” Custom Window Co. was the source SHC and Design Alaska had listed in the proposal as providing the force protection windows (supp. R4, tab 7). Reference to Custom Windows Series 8200 as the source of the force protection windows was in the 65% design and 95% design submittals (ex. A-89). The reference to Custom Windows Series 8200 was deleted in the 100% design dated 26 August 2004 (ex. A-89; tr. 83).

35. In late July 2004 AG&D contacted three manufacturers with whom it already did business as potential sources for the force protection windows (ex. A-58 at 33). None of them could meet the requirement for CRF 67 (ex. A-58 at 38-49). On 13 August 2004 AG&D advised SHC that force protection windows were a “highly specialized product with a small market” (R4, tab 23). Mr. Thornock testified:

You have two different worlds. You have the world of windows and the arctic climate, and you have the blast mitigation windows that are required everywhere based on the latest military specifications.

And, now, you know, they’re trying to put them both together to go for up north, so it’s new – it’s new.

(Ex. A-57 at 32, *accord* ex. A-58 at 40-41; tr. 120-21) While new in the United States since 11 September 2001, blast resistant windows have been in use “for a long time” in Israel (ex. A-58 at 31).

36. There were window manufacturers who could manufacture to meet any CRF rating. For example, the government was able to determine, during its consideration of SHC’s claim:

TRACO stated that they could provide the product, but the CRF testing would have to be done (and someone would have to pay for it). The thing to keep in mind here is that force protection windows are not something you can get right off the shelf. Are there other manufacturers out there who could meet the spec (including the CRF requirement)? Absolutely. Would there be some lead time involved? Absolutely....”

(Ex. A-85 at 2, *accord* ex. A-58 at 40-42; tr. 124-28)

37. On 16 August 2004 SHC submitted to the government a request for a variance from the requirement for CRF 67 to a CRF 53 (R4, tab 21). This was the first notification the government had received that SHC was having difficulty procuring windows meeting the RFP performance requirements (R4, tabs 11, 21; tr. 19). On 17 September 2004 the government approved a variance to a CRF of no less than 60 (R4, tab 19). There was no mention in SHC's request for a variance of an alleged defective specification (R4, tab 9 at 000040). SHC's project manager testified "what we really wanted to do when we asked for the deviation was get a system that we could get in our budget range" (ex. A-60 at 103).

38. The CRF was important to the performance of the blast resistant window in the extremely cold temperatures in Alaska. Cold temperatures outside the window and humidity inside the window could result in excessive condensation forming on the frames of the windows causing "serious problems" (ex. A-89). Mr. Walter Heins, a senior government engineer, provided the following information to the contracting officer:

In a "normal" office building, the relative humidity indoor will drop during the coldest weather to probably about 15%. Further, the ASHRAE 99.6% design condition only occurs 35 hours per "normal" year. This would lead me to say that a CRF of 60 will prevent condensation from forming on windows to a damaging degree in the non-humidified office building. A "small" degree of condensation could still be possible, so if the program was to guarantee against condensation, CRF 60 would be cutting it pretty close.

The caveat to this opinion is that at "design" condition, the CRF 60 window is at or near its ability to combat condensation and a small change could impact the formation of condensation. If a buffer to guarantee against condensation is desired, the CRF would have to be higher, say 65-67. Further, room air distribution and the position of drapes and shades could alter the conditions at the window/room air interface and allow condensation to occur under a worst-case scenario.

(Ex. A-80 at 3-4)

39. On 5 October 2004 SHC advised the government that it had released a window package from the manufacturer Oldcastle-Arpal to AD&G to get the submittals moving (R4, tabs 16, 17; supp. R4, tabs 9, 13). Oldcastle-Arpal was not contacted until their name was given to SHC by the government as a possible source (ex. A-58 at 49-50;

tr. 22-23). However, Oldcastle-Arpal was a manufacturer familiar to AD&G. AD&G's Mr. Thornock testified, "[w]e use them all the time" (ex. A-57 at 30). There is nothing in the record to explain why AD&G had not months earlier contacted this source known to it. On 28 October 2004, SHC and AG&D executed a subcontract for, among other items, the windows at issue (supp. R4, tab 2). AG&D released its full submittal package to SHC on 9 November 2004 (R4, tab 9 at 000040). SHC submitted the window package to the government on 16 December 2004, a full five weeks after receiving it from AG&D. The government returned the approved submittal the next day. (R4, tab 9 at 000043, tab 35)

40. In a 29 December 2004 email, the window manufacturer Oldcastle-Arpal requested the status of the submittals and advised that one component had a long lead time. On 3 January 2005 SHC replied that the window submittal was approved and it would "try to get your copies in the mail this week." AG&D advised on that same day that it could not proceed without copies in hand and that the lead time was now 18-20 weeks to the job site. The windows were actually ordered on 10 January 2005 (after a question arose and was answered that same day as to color). (R4, tab 15 at 000056-57)

41. The windows arrived on the jobsite on or about 17 May 2005 (R4, tab 10 at 000046; exs. A-17, -18, -20).

42. On 23 February 2006 SHC submitted a request for equitable adjustment in the amount of \$124,011 alleging that the "RFP was defective in specifying a window that was not available at the time of this contract award" (R4, tab 10; ex. A-13).

43. SHC submitted its certified claim for "Window-Faulty Specification" on 30 June 2006 (R4, tab 6).

44. The contracting officer's 30 January 2007 final decision denied SHC's claim (R4, tab 1 at 000018-19).

45. On 26 February 2007 SHC appealed from the contracting officer's final decision. The appeal was docketed as ASBCA No. 55813. (R4, tab 2 at 000031)

DECISION – ASBCA No. 55813

SHC contends that the RFP specification was defective because no window existed at the time of its proposal that could meet the CRF requirement of 67. SHC further contends it suffered compensable delays and increased costs as a result of the defective RFP. We decide entitlement only on the issue of whether the RFP specification was defective. The alleged delays and associated costs are the subject of separate appeals not at issue here.

It is well-established that:

Performance specifications specify the results to be obtained or the objective or standard to be achieved, and leave it to the contractor to determine how to achieve that objective, standard or those results, while design specifications explicitly state how the contract is to be performed and permit no deviations.... Specifications that state the operational characteristics desired of a product without establishing strict design requirements that must be followed exactly are considered to be performance rather than design specifications.

MCSD Construction Co., ASBCA Nos. 37226, 37239, 91-2 BCA ¶ 23,986 at 120,045; *see also Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1582 (Fed. Cir. 1987). The RFP specifications relating to the windows at issue were performance specifications. They listed 14 characteristics the windows must meet, but left to SHC such particulars as location, size, manufacturer and installation method (finding 29).

There is no dispute that the government authored the RFP performance specification. However, the design/build contract required SHC and its architect of record, Design Alaska, to design the project. That is, they were responsible to create the design specifications in accordance with which the project was to be constructed, making sure those specifications met the various performance characteristics set forth in the RFP. As the design/build contractor of the project, SHC was the party responsible for any defects in the design as set forth in its design specifications. (*See findings 3, 4, 6*)

SHC argues that it had no choice but to make sure its proposal and design specifications mirrored the RFP requirements. However, if SHC indicated in its proposal and design specification submissions that it would meet the RFP performance requirements without adequate investigation, it did so at its own risk. SHC was obligated to not just say that it would meet requirements, but also to be sure it could actually do so. SHC apparently assumed, even though the RFP made no such representation, that a ready-made window existed or that a compliant custom made window could be acquired within its budget that met the RFP requirements (finding 29). It (as well as its designer and its window subcontractor) did little investigation prior to submitting its proposal or even before substantially completing its design during the performance period (findings 31-32, 34-36, 39).

The record does not support SHC's argument that there were no windows capable of meeting the RFP performance requirements. The RFP does not require nor promise the availability of ready-made windows. There is evidence that windows meeting all RFP performance requirements could be manufactured given enough time (finding 36).

The evidence shows only that SHC could not find an off-the-shelf ready-made window meeting the requirement of CRF 67 and which was within its proposed budget (finding 37). Had SHC, its architect of record and its window subcontractor investigated window availability in the proposal phase they would have discovered that it was unlikely they would find windows meeting all the RFP requirements without having them custom manufactured with attendant cost and long lead times. However, SHC and its subcontractors did not fully investigate window availability until late in the design process (finding 34). SHC must now bear the burden of its failure to investigate the availability of the required windows.

ASBCA No. 55813 is denied.

CONCLUSION

ASBCA Nos. 55671 and 55813 are denied.

Dated: 22 May 2008

DIANA S. DICKINSON
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

PAUL E. WILLIAMS
Administrative Judge
Chairman
Armed Services Board
of Contract Appeals

MARK N. STEMLER
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 Nos. 55671, 55813, Appeals of Strand Hunt Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

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