

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Corners and Edges, Inc.) ASBCA No. 55767
)
Under Contract No. 263-99-C-7278)
(NO2-A0-97278))

APPEARANCE FOR THE APPELLANT: Mr. John E. Larson
Secretary

APPEARANCE FOR THE GOVERNMENT: Mogbeyi Omatete, Esq.
Trial Attorney
Department of Health and
Human Services
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE DELMAN

In this appeal Corners and Edges, Inc. (CEI or appellant) seeks to recover additional costs to perform work that allegedly was not part of the contract. The government denies liability. The parties elected to submit their positions on the record pursuant to Board Rule 11, and the appeal is before us on entitlement only. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613.

FINDINGS OF FACT

1. On 1 October 1998, the National Institutes of Health, National Institute of Allergy and Infectious Diseases (NIH or government) awarded the subject contract to CEI. The contract was a firm fixed-priced contract to provide janitorial services at the Rocky Mountain Laboratories complex (RML) in Hamilton, MT. Insofar as pertinent, Article C.1., STATEMENT OF WORK (SOW) at ¶ 1 provided that “[t]he contractor shall furnish all necessary labor, supervision and services to provide complete janitorial services” for the RML (R4, Binder #5, tab 2 at 6). The SOW identified the various areas of space to be cleaned and the janitorial services to be performed on a daily, monthly, quarterly or annual basis as provided in the contract schedule and provided minimum quality requirements. (*Id.* at 10-19)

2. The contract term was one year with a government option to extend performance on a yearly basis for up to four additional years. During the course of performance the government exercised these options through September 2003, and also

extended performance beyond the close of the last option period through March 2004. (R4, Binder #5, tab 3, Modification Nos. 2, 3, 4, 7, 11, 12, 13)

3. The contract provided estimates of the square footage of floor space to be cleaned under the contract in the various buildings that made up the RML complex for each year of the contract, and appellant proposed a unit price per square foot to perform the work which, as extended, became the contract price for that year (R4, Binder #5, tab 2 at 4-5). The government provided estimates in consideration of renovation work that it planned for the site. Insofar as pertinent, the SOW, ¶¶ 1, 8, provided as follows:

For approximately the first three years of this contract the Rocky Mountain Laboratories will be undergoing significant renovations. As a result, the amount of the space to be cleaned will vary as buildings are removed from and then returned to the contract.

....

Attachment 1 (“Task Areas”), provides the floor plans for the areas to be serviced.... Due to renovations, task areas are subject to change throughout the life of the contract (see attachment). All dimensions, square footage and room size breakdowns contained in the floor plan are reasonable estimates and intended to assist bidders in the preparation of their bids.

(*Id.* at 6-7) The contract did not fix or guarantee the number of government researchers or biologists that would be using the space to be serviced by appellant, or their furnishings or professional equipment.

4. Under SECTION G – CONTRACT ADMINISTRATION DATA, Article G.1 Project Officer, the contract provided as follows:

The Project Officer is responsible for: (1) monitoring the contractor’s technical progress, including the surveillance and assessment of performance and recommending to the contracting officer changes in requirements; (2) interpreting the statement of work and any other technical performance requirements; (3) performing technical evaluation as required; (4) performing technical inspections and acceptances required by this contract; and (5) assisting in the resolution of technical problems encountered during performance.

For guidance from the Project Officer to the contractor to be valid, it must: (1) be consistent with description of work set forth in this contract; (2) not constitute new assignment of work or change to the expressed terms, conditions, or specifications incorporated into this contract; (3) not constitute a basis for an extension to the period of performance or contract delivery schedule; (4) not constitute a basis for any increase in the contract price or extension to the contract delivery.

The Contracting Officer is the only person with authority to act as agent of the Government under this contract. Only the Contracting Officer has authority to: (1) *direct or negotiate any changes in the statement of work*; (2) modify or extend the period of performance; (3) change the delivery schedule; (4) authorize reimbursement to the Contractor any costs incurred during the performance on his contract; or (5) *otherwise change any terms and conditions of this contract.*

(R4, Binder #5, tab 2 at 22) (Emphasis added)

5. Insofar as pertinent, the contract provided that appellant was to empty the small trash containers in the offices and laboratories on a daily basis, collect all the trash and bring it to the incinerator on the RML campus. The government provided appellant with two wheeled carts to collect the trash. Appellant pushed the carts around the halls and emptied the smaller trash containers from the offices and labs into these carts. When the carts were full, appellant took them to the incinerator area and left the carts there until the incinerator operator dumped the content of the carts into the loading ram of the incinerator where the trash was burned. As long as the trash could be taken directly to the incinerator and emptied into the loading ram in this fashion, there was no need to bag this trash. (App's record submission, 11/27/07, ex. A-1, Bergman aff. ¶ 3)

6. In January 2000, the RML incinerator was shut down for an extended period to install a scrubber and to make other improvements in the equipment. The government decided that the trash would be stored in large dumpsters on the site until the renovation work was completed and the trash could be burned in the incinerator. From the government's perspective, it now became necessary to have the office and laboratory trash placed in plastic bags to facilitate moving the trash in and out of these dumpsters. (*Id.* ¶ 4) The SOW did not specifically address the bagging of this type of trash.

7. By letter to appellant dated 20 January 2000, Dr. Robert K. Bergman, project officer, instructed appellant that starting 24 January 2000 all trash collected from the wastebaskets in the labs and offices should be single bagged and tied in large, clear

plastic bags (*id.*, ¶ 5). As far as this record shows, appellant did not challenge Dr. Bergman's authority to issue this order nor did it otherwise advise the contracting officer (CO) of the directive at this time. Rather, it appears that appellant complied with this directive when it was received without objection or protest.

8. Dr. Bergman was subsequently replaced as project officer by Mr. Mark Mora. According to appellant, Mr. Mora orally directed appellant on 7 February 2002 "to begin performing dusting services in office areas," which appellant understood - and the government does not dispute - as requiring the dusting of unobstructed horizontal surfaces in the office areas on a daily basis (app. supp. R4, 4/23/07, tab 1 at 5). For the office areas and the mail room the contract provided for daily cleaning of "counter tops if unobstructed with untreated cloth" (R4, Binder #5, tab 2 at 11), but it did not address other unobstructed horizontal surfaces in these areas, like window ledges. Appellant dusted these additional areas as directed by Mr. Mora. Appellant did not challenge Mr. Mora's authority to issue this order.

9. By letter to the CO dated 27 March 2002, roughly seven weeks after receipt of Mr. Mora's directive, appellant advised that it considered the directive to be a constructive change order to the contract (app. supp. R4, 4/23/07, tab 1 at 5). In a separate letter of this date, appellant also advised the CO that it considered Dr. Bergman's directive of 20 January 2000 regarding the bagging of trash to be a constructive change order to the contract (*id.* at 1). In a third letter of this date, appellant advised the CO of its claimed additional costs, in the amount of \$13,244.56, and included a claim for a "changed condition." This latter claim sought reimbursement for additional janitorial work caused by an increase in the number of biologists and researchers and their equipment at RML during the contract term. According to appellant, this increase in personnel caused an increase in trash collection and trash hauling and more frequent restocking of restroom supplies, and caused appellant to expend additional time to perform floor sweeping, mopping, stripping and waxing. (*Id.* at 6-7)

10. Over the next several months, the CO sought and appellant provided some additional information with respect to appellant's contract performance and the claims (see letters attached to app. mot. summ. j., ex. E), but the CO did not address the merits of the claims nor did he address the directives issued by the project officers at this time.

11. Over the next several years, appellant filed additional claim letters with the CO, revising the amounts due for the aforementioned claimed constructive changes and the changed condition during the course of performance. Appellant filed an amended, certified claim dated 4 October 2006, seeking \$194,076 and requested a final decision (app. supp. R4, tab 1 at 26). Appellant filed a notice of appeal on 4 January 2007 from

the CO's failure to issue a decision on the claim, and the appeal was docketed under ASBCA No. 55767.¹

DECISION

In its submission before the Board appellant focuses primarily on the nature of the work before and after the claimed changes and the additional costs it incurred. However the subject orders or directives were issued by project officers and appellant must show that these orders were authorized under the contract in the first instance.

This contract provides that a project officer is *not* authorized to issue changes to the contract or to issue any direction that will cause an increase in the contract price. The contract identifies the CO as the person authorized to issue changes to the contract work. The CO did not issue the claimed changes here. Indeed, we read the contract to state that any guidance from a project officer changing the terms and conditions of the contract is *not valid*. Notwithstanding, appellant followed such invalid direction here.

A CO may ratify an unauthorized contract act under certain circumstances. "Ratification requires knowledge of material facts involving the unauthorized act and approval of the activity by one with authority." *Winter v. CATH-dr/Balti Joint Venture*, 497 F.3d 1339, 1347 (Fed. Cir. 2007). Assuming, *arguendo*, that the CO had the requisite knowledge of material facts involving the unauthorized acts so as to allow for an informed decision with respect to the ratification of these matters, appellant must show that the CO approved the unauthorized directives. Ratification must be based on a demonstrated acceptance of the unauthorized act. Silence, without more, is not sufficient. *Harbert/Lummus Agrifuels Projects v. United States*, 142 F.3d 1429, 1434 (Fed. Cir. 1998). See also *Real Estate Technical Advisors, Inc.*, ASBCA Nos. 53427, 53501, 03-1 BCA ¶ 32,074 at 158,508 ("[r]atification generally requires that the superior official had authority to ratify, knowledge of the subordinate's unauthorized act, and then acted to adopt the unauthorized action").

Appellant has not provided any evidence showing that the CO demonstrably accepted the project officers' directives. Accordingly, appellant may not recover for these unauthorized acts. For this reason we need not further explore the specific nature of the directives given by the project officers and whether appellant incurred any additional costs to perform them.

¹ The CO subsequently issued a decision on appellant's 4 October 2006 claim, which was appealed and docketed under ASBCA No. 56277. The Board dismissed this appeal for lack of jurisdiction. *Corners & Edges, Inc.*, ASBCA Nos. 55767, 56277, 08-2 BCA ¶ 33,949.

As for appellant's claim of a "changed condition"² appellant fails to show how the job conditions it encountered were materially different from those identified in the contract. This contract did not represent or otherwise guarantee to appellant the number of biologists or researchers using the space and/or the amount of their associated furnishings and professional equipment. To the contrary, the contract required appellant to provide "all necessary labor" to provide "complete janitorial services" at the RML (finding 1). Nor did appellant show that the government withheld any superior knowledge from the appellant in the bid documents regarding the growth of the laboratory staff throughout the contract term. This was a firm fixed-price contract, and absent contract language stating otherwise we believe that appellant assumed the risk of changes in employment at RML, the related increases in foot traffic and the increased use of the space by personnel that may have contributed to more time-consuming janitorial effort. We deny appellant's claim for a changed condition.³

CONCLUSION

For reasons stated, the appeal is denied.⁴

Dated: 24 November 2008

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

² The contract did not contain a clause regarding "changed conditions." We assume that appellant's claim is based upon the Changes clause, FAR 52.243-1, CHANGES-FIXED PRICE (AUG 1987), ALTERNATE I (APR 1984). (R4, Binder #5, tab 2 at 29)

³ To the extent that appellant characterizes this claim as one for "differing site conditions" (app. br. at 7), we note that the contract did not contain a Differing Site Conditions clause (*see* FAR 52.236-2), and hence contract relief is also unavailable on this basis.

⁴ In view of our disposition appellant's motion for summary judgment, which had been deferred, is denied as moot.

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. 55767, Appeal of Corners and Edges, Inc., rendered in conformance with the Board's Charter.

Dated:

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