

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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DMJM H&N, Inc. ) ASBCA No. 56557  
 )  
Under Contract No. FA4664-06-D-0001 )

APPEARANCE FOR THE APPELLANT: Donna M. Noble, Esq.  
Manager of Contracts

APPEARANCES FOR THE GOVERNMENT: Richard L. Hanson, Esq.  
Air Force Chief Trial Attorney  
Christopher S. Cole, Esq.  
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE STEMLER

DMJM H&N (appellant) timely appealed from the denial of its claim for \$10,976.17 for alleged increased costs in performance of its contract. The parties have submitted the appeal for decision on the record under Board Rule 11. Only entitlement is to be decided. We deny the appeal.

FINDINGS OF FACT

1. The Air Force (AF or government) awarded appellant the captioned indefinite delivery, indefinite quantity (IDIQ) Architect and Engineer (A&E) contract on 13 July 2006, calling for appellant to perform Type A and Type B A&E services at March Air Reserve Base, California (R4, tab 13 at 1). The contract included a rate schedule with an hourly price breakdown by discipline for the base year and each option year (R4, tab 13 at 4-5). The A&E services were to include production and delivery of “drawings, design analysis, cost estimates, and technical specifications as required for the development of complete documents for construction of each project” (R4, tab 13 at 6).

2. Part I of the contract’s Statement of Work (SOW) identified general requirements for the “complete detailed designs for maintenance, repair, alteration, and new construction projects” at the air base (R4, tab 13 at 9-11). Each project would be ordered via a task order and include an additional statement of work (R4, tab 13 at 9, ¶ 3). Prior to negotiation and award of each task order, the contractor and government were to meet to “ensure that the A&E clearly comprehends and understands the various tasks that are required under each type and phase of work” (R4, tab 13 at 10, ¶ 9).

3. The IDIQ contract called for specific periods of performance or “phases” of each task order, requiring submissions from appellant at the completion of each phase (R4, tab 13 at 11, ¶ 15.1). At each of these phases, the contract provided for the government to make review comments (R4, tab 13 at 11, ¶ 17). These review comments were then to be addressed by the A&E for submittal in the next phase (R4, tab 13 at 11, ¶ 17).

4. Part II of the SOW identified the design requirements and stated the contractor “shall perform all services required to prepare and furnish complete construction documents for the accomplishment of the project” in accordance with each task order statement of work and the overall IDIQ contract (R4, tab 13 at 11).

5. Requirements for each phase of the design process were then defined, beginning with Phase 1, the investigative report/concept submittal phase (R4, tab 13 at 12, ¶ 3). Following the paragraph detailing Phase 1, requirements for the contract drawings were defined, specifying that the contractor use AutoCAD computer aided design and drafting software in preparing the drawings or convert the drawings to this format for final disk submittal (R4, tab 13 at 12, ¶ 4).

6. The next phase, the “Early Preliminary (35%) Design” phase, required that the contractor provide a specific design draft showing how the proposed design “satisfies the functional needs” of the government and must “incorporate any government review comments received from [Phase 1]” (R4, tab 13 at 14, ¶¶ 8.1.1., 8.1.6.).

7. Phase 3 was described as the “Regular Preliminary (65%) Design.” The design documents at this phase were described as intermediate, and were to verify that the project was sufficiently coordinated among disciplines and “thought out to proceed with no major changes in design” (R4, tab 13 at 14, ¶ 9.1). The contractor’s design draft was required to show that “all major items of work have been addressed, refined and fully developed.” Drawings were to be developed to the working drawing level and “[a]ll major plans and details shall be virtually complete” (R4, tab 13 at 14, ¶ 9.1.1.).

8. Phase 4, the “Pre-Final (95%) Design Documents,” was to present the intermediate design completed to 100%, including “integration of review comments resulting from the previous review (35% or 65%, as applicable),” and providing “complete, fully developed drawings, which include all new and/or revised drawings and details required by the previous submittal” (R4, tab 13 at 15, ¶¶ 10.1, 10.1.2.).

9. The final phase was described as the “Corrected Final (100%) Design (Phase 5).” This design draft submittal was to “include all of the 95% documents with all final corrections completed. Major changes to the basic design will not be permitted at this time, unless these changes are the result of incorporation of 95% review comments....” (R4, tab 13 at 16, ¶ 12)

10. The IDIQ contract also incorporated several clauses by reference, including FAR 52.243-1 CHANGES—FIXED PRICE (AUG 1987) ALTERNATE III (APR 1984) (R4, tab 13 at 27). Paragraph (a) of this version of the Changes clause allows the contracting officer to make changes within the general scope of the contract in the services to be performed. Paragraph (b) addresses the impact of any change on the cost:

If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

Payment was to be made according to a percentage schedule in the contract after acceptance of each phase (R4, tab 13 at 11, ¶ 16).

11. Under the IDIQ contract, on 12 September 2007, the government issued Task Order No. 0004 to appellant for A&E services, “including all travel, materials, supplies, and supervision required to fully investigate and design” the renovation of Facility 1221 at the Air Reserve Base for a fixed price of \$192,133.77 (R4, tab 1 at 1-2). The task order’s SOW specified that the project was a design contract and required the contractor to, among other things, “prepare and finish complete construction documents consisting of contract drawings...” (R4, tab 1 at 4, ¶ 1). Specifics to accomplish the design of the renovation were enumerated, however, the task order stated the list was not exhaustive (R4, tab 1 at 4, ¶ 2). Among the specifics were: “[p]rovide and develop a new floor layout...” (¶ 2a); “[p]rovide fire protection sprinkler system....design new fire protection system...” (¶ 2b); “[p]rovide new HVAC system...” (¶ 2c); [u]pgrade electrical including lighting...” (¶ 2e); and “[r]eplace and renovate the existing wash room and install additional men and women latrine including plumbing and toilet.... Replace sanitary sewer line 5 feet outside buildings” (¶ 2f). The SOW further stated the contractor “shall provide 30%, 65% and 95% and 100% and final design” with each due four weeks after the contractor receives the government’s comments (R4, tab 1 at 4, ¶ j).

12. In April 2008, the government and appellant participated in a 65% design review meeting (R4, tabs 3-6). During the meeting the government made several comments on the design draft (R4, tabs 5-6). Numerous design revisions were identified (R4, tab 7).

13. By letter dated 29 April 2008, appellant submitted a \$10,976.17 “Change Order request” based on the work required by the government design comments during the 65% design review. The letter included an attachment identifying the item and man-hour impact for each comment. (R4, tab 8)

14. The items referenced by appellant were item 4 (a comment that the existing plumbing piping needed to be evaluated to determine how much piping would need to be replaced), item 5 (a comment that the design relocate a column from the center of the room in response to which appellant suggested moving the room itself to avoid moving the column), item 13 (a comment that the exit lighting must meet code and a question about the feasibility of replacing smoke detectors with heat detectors), item 14 (a

comment relating to the functionality of proposed roll-up doors in the event of fire), item 26 (a comment to amend the design draft which currently allowed a direct line of sight into the female restroom), and item 34 (a comment about relocating the air conditioning units to accommodate space requirements) (R4, tabs 7 at 2-6, 8 at 2).

15. After reviewing the request for a change order, by letter dated 20 May 2008, the contracting officer issued a denial, stating that the changes were “within scope and a normal part of the design process” as required by the IDIQ contract and task order (R4, tab 9).

16. By letter dated 18 June 2008, appellant submitted a request for reconsideration on the denial of its initial request, citing to the Changes clause and contending that changes to contractor performance, even if within scope of the contract, are grounds for a request for equitable adjustment when the changes result in an increase in the contractor’s cost (R4, tab 11).

17. The contracting officer denied appellant’s renewed request by letter dated 30 June 2008, stating that additional compensation would be warranted under the Changes clause “if costs are not within scope of the Statement of Work. The changes were again within scope and no additional costs would be incurred.” (R4, tab 12)

18. Appellant appealed to the Board by letter dated 19 August 2008.

19. The parties submitted briefs and reply briefs but beyond the Rule 4 file, neither party submitted any evidence.

### DECISION

We are confronted with the issue of whether the design work prompted by the design review comments amounted to changes in services to be performed, or was required by the contract.

Here, the contract states appellant’s services were to include production and delivery of all drawings, design analysis, cost estimates and technical specifications required for the development of complete construction documents (finding 1). At each phase of production the government was to make review comments which were to be addressed in the following phase submittal (finding 3). The drawings for Phase 3, which gave rise to the present controversy, were to be developed to the working level with major plans and details, and were to verify that the project could proceed without major changes (finding 7). The task order for the renovation project restated the phase requirement, defining the phases in accordance with the IDIQ contract (finding 11).

The government argues that the design changes which resulted from government review comments were those “specifically required in a normal A&E contract and in this contract” (gov’t br. at 11). The changes at issue were not changes “in services to be performed,” which would give rise to a right to compensation, but permitted changes which followed a periodic design review meeting.

Appellant contends that while the changes at issue may be within the general scope of the contract, because the changes caused an increase in the cost of performance, it was entitled to an equitable adjustment (app. br. at fourth page). Appellant alleges, without the proffer of any evidence to support that allegation, that the changes were over and above customary anticipated design changes since the contracting officer modified the original layout at the 65% design review, “which significantly impacted the ongoing design and involved rework.” According to appellant, the comments caused “a significant change to the layout” at the phase of the contract where the design should have been, quoting the contract, “sufficiently coordinated. . .and thought out to proceed to completion with no major changes in design.” (App. reply br. at 2) Appellant went into no further explanation of the nature of the design change, except to state that although its use of the software made making the changes easier “it did not make the changes effortless and free of cost” (app. reply br. at 3).

Phase 3 of the contract, titled “Regular **Preliminary** (65%) Design” (emphasis added), defined the documents in that submittal as “intermediate” (finding 7). The design at this point was not contemplated as being final, as in the subsequent phases—the pre-final phase, where the drawings were to present the “intermediate design completed to 100%” (finding 8), or the final phase (finding 9). Further, even in the final phase, changes would be allowed if those changes were “the result of incorporation of 95% review comments.” (Finding 9)

Clearly, on these facts, even if the comments appellant complains of were “major,” as it alleges, the review did exactly what it was meant to do—verify and correct what was wrong so the project could proceed. It is simply unreasonable for appellant to declare at the project halfway point, that it should be compensated for any changes not “effortless.”

In our view, the government design comments (changes) were contemplated by the contract’s structure and appellant did no more than it was required to under the terms of the contract. If appellant’s logic were to be followed, the government would be required to accept designs and plans providing for restrooms in public view and exit signs that did not comply with codes, or pay additional amounts for corrected drawings and plans. Indeed, under appellant’s interpretation of the contract, it would have been to its benefit to deliver plans and drawings as deficient as possible, guaranteeing many government comments and subsequent additional payments for correction of the deficiencies.

Appellant has failed in its burden of proof.

CONCLUSION

The appeal is denied.

Dated: 10 June 2009

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MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

I concur

I concur

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EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

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ALEXANDER YOUNGER  
Administrative Judge  
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. 56557, Appeal of DMJM H&N, Inc., rendered in conformance with the Board's Charter.

Dated:

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