

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Cooley Constructors, Inc.) ASBCA No. 57404
)
Under Contract No. W911YN-08-C-0004)

APPEARANCE FOR THE APPELLANT: Reese J. Henderson, Jr., Esq.
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OPINION BY ADMINISTRATIVE JUDGE JAMES
ON GOVERNMENT’S MOTION FOR SUMMARY JUDGMENT

This appeal involves a contract to replace a building for the Florida Air National Guard (FLANG). The contractor, Cooley Constructors, Inc. (Cooley), seeks an equitable adjustment for alleged additional work on communications cabling. The government has moved for summary judgment. The motion is denied.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. The United States Property and Fiscal Office for Florida (USPFO) issued a solicitation in 2008 for Project No. LSGA029009, to replace existing communications Building 37 at the 125th Fighter Wing, Jacksonville, Florida (R4, tab 2 at 1, *see* tab 1 at 1).
2. On 26 September 2008 USPFO awarded Contract No. W911YN-08-C-0004 (the contract) for Project No. LSGA029009 to Cooley (gov’t mot., Undisputed Material Facts (UMF)¹ ¶¶ 1, 2; R4, tab 2 at 2).
3. The contract incorporated by reference various standard clauses, including FAR 52.243-4, CHANGES (JUN 2007) and FAR 52.236-21, SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (FEB 1997) – ALTERNATE 1 (APR 1984); and it contained

¹ Citations to “UMF” are to the government’s proposed facts that appellant does not dispute.

DFARS 252.236-7001, CONTRACT DRAWINGS AND SPECIFICATIONS (AUG 2000)
(R4, tab 2 at 9, 24).

4. Contract specification, § 16711, “TELECOMMUNICATIONS OUTSIDE PLANT (OSP),” ¶ 1.4, “SYSTEM DESCRIPTION,” provided in pertinent part:

- A. The telecommunications outside plant consists of cable, conduit, maintenance holes, etc. required to provide signal paths from the existing Communications Buildings (37 and 5) to the new facility, including free standing frames or backboards, interconnecting hardware, terminating cables, lightning and surge protection modules at the entrance facility. The work consists of providing, testing and making operational cabling, interconnecting hardware and lightning and surge protection necessary to form a complete outside plant telecommunications system for continuous use. Review drawing for details on cable size and types. The telecommunications contractor must coordinate with the FLANG communications personnel concerning layout and configuration of the EF [entrance facility] telecommunications and OSP....

(R4, tab 3 at 3-4)

5. Contract specification § 16711, ¶ 1.6, “QUALITY ASSURANCE,” provided in part:

- B. Telecommunications Outside Plant Shop Drawings: Provide diagram of Outside Plant Design in accordance with ANSI/TIA/EIA-758, RUS Bul 1751F-643 for underground system design. Provide T0 shop drawings that show the physical and logical connections from the perspective of an entire campus, such as actual building locations, exterior pathways and campus backbone cabling on plan view drawings, major system nodes, and related connections on the logical system drawings in accordance with ANSI/TIA/EIA-606-A. Drawings shall include wiring and schematic diagrams for fiber optic and copper cabling and splices, copper conductor gauge and pair count, fiber pair count and type, pathway duct and innerduct arrangement, associated construction materials, and any details required to demonstrate that cable system has been coordinated and will properly support the

switching and transmission system identified in specification and drawings. Provide Registered Communications Distribution Designer (RCDD) approved drawings of the telecommunications outside plant. Update existing telecommunication Outside Plant T0 drawings to include information modified, deleted or added as a result of this installation in accordance with ANSI/TIA/EIA-606-A....

(R4, tab 3 at 5)

6. Drawing T-401, "REPLACE COMMUNICATIONS FACILITY...MANHOLE DIAGRAM," had four details, including: (1) Butterfly of Existing Maintenance Hole 1 (MH-1); (2) Butterfly of New Handhole by Building 37; (3) Typical 9-Way Comm Duct Bank; and (4) Cable Labeling (R4, tab 4).

7. On or about 30 July 2008 the USPFO answered pre-proposal questions (R4, tab 1). According to the government, those questions and answers were posted on the "www.nationalguardcontracting.org/Ebs/AdvertisedSolicitation.asp" website during the solicitation phase (gov't mot., proposed fact ¶ 5). Cooley states that it has no knowledge regarding the foregoing assertion, and that the government has provided no evidence to support it (app. opp'n at 2). However, Cooley's 1 March 2010 e-mail to the contracting officer (CO) Brian J. Williams stated that its subcontractor, White Electrical Construction Co. (White), was provided with the pre-proposal questions and answers before White finalized its bid to Cooley, which was on 5 June 2009, after award of the prime contract (R4, tabs 11, 15, ex. 5 at 1, UMF ¶ 9).

8. The government's answer to pre-proposal Question 1 stated: "All the copper and fiber optic cables that terminate in Building 37 will be relocated to the new communications build Core 118, the cables all appear in MH-1. All the copper cable will need to be extended and spliced in MH-1 and extended to new lighting [sic] protectors in Core 118." (R4, tab 1 at 1)

9. Pre-proposal Question 5 asked if the government could provide a cable schedule "as to what existing cables are to be removed and reinstalled, which cables are to be removed, and which cables are to be new including starting and end buildings." The answer stated: "T-401 detail #1 show[s] all the existing copper and fiber going from MH 1 into building 37 that will need to be relocated into the new Communications Building." (R4, tab 1 at 2)

10. Cooley entered into a subcontract with White on 5 June 2009 to provide "Electrical to include but not limited to: lightning protection, and all low voltage raceway and related accessories" for the project. On 18 August 2009, a change order to

the subcontract added *inter alia* “Telecommunications Outside Plant, section 16711.” (R4, tab 15, ex. 5 at 1, ex. 6)

11. White’s 17 September 2009 letter to Cooley requested \$190,191 for “additional costs for this scope of work,” *inter alia*, “to relocate existing copper cables from building 37 to the new communications building” (R4, tab 8 at 5).

12. CO Williams’ 30 October 2009 letter to Cooley stated:

A recurring comment was made by Truevance at the meeting held 10/28/09 regarding lack of detail in the drawings related to copper; specifically a riser diagram. The Government received no request for any additional diagrams prior to receiving proposals.... A copy of the pre-proposal questions and answers document is attached.

(R4, tab 8 at 2) Citing specification § 16711 and DFARS 252.236-7001, CO Williams opined that the communications scope of work was clearly stated in the specifications and supported by information in the drawings. He directed the contractor to take necessary steps to complete the scope of work for the system required by specification § 16711. (R4, tab 8 at 2)

13. Cooley’s 20 November 2009 letter to CO Williams requested an equitable adjustment (REA) seeking \$192,910.93 for additional items not included in the government’s plans and specifications, but necessary to complete the outside plant copper work, and stated:

- In the October 28th meeting, [White] attempted to make the Government see that there is nothing on the drawings or specifications that shows what specifically our scope of work is...for the OSP copper portion of specification [§] 16711. However, in the Government’s [30 October 2009] letter they are saying a combination of the specs, a question and answer document and the drawings show the intent of what needs to be done....

....

- The drawing...T-401, detail 1, shows us an existing hand [sic] hole with cables in it. It does not tell us what to do with them. It does not say “splice cables here” or “extend these cables into the new building”...there is no clear and

definite scope of work explaining exactly what cables are to be rerouted into the new building.

(R4, tab 9)

14. On 11 February 2010 FLANG issued Drawing No. LSGAG12011MH000, “MANHOLE RACKING DIAGRAM” (MRD) of July 2009 to White (compl. and answer ¶ 18, compl. ex. 7; app. opp’n, ex. B). Cooley asserts, and the government denies, that the government directed White “to furnish and install copper slices [sic] and wiring as depicted” on the MRD (compl. and answer ¶ 18).

15. Cooley furnished and installed 5,400 pairs of copper splices and wiring at an alleged cost of \$155,516.84, said to include White’s price of \$139,344.52 and Cooley’s markups (R4, tab 12 at 1; compl. and answer ¶ 21).

16. Cooley’s 2 June 2010 letter to CO Williams certified its REA in the language required by the Contract Disputes Act (CDA), 41 U.S.C. § 7103(b), sought \$155,516.84, and requested his decision (R4, tab 12).

17. By letter dated 9 July 2010, Registered Communications Distribution Designer (RCDD) Scott Brown of “PearlNet” responded to USPFO’s request to determine its “responsibilities as a telecommunications contractor” as if it had been an offeror on Project No. LSGA029009. RCDD Brown stated that based on the project specifications and drawing T-401 “there were requirements to move five (5) multi-pair cables” identified in drawing T-401, detail 1, as CA01-CA05 (which totaled 5,400 pairs), and that if PearlNet had been asked to provide pricing on such a project, it would have confirmed its assumptions by submitting questions to FLANG. (R4, tab 13)

18. CO Williams denied Cooley’s 2 June 2010 claim on 30 July 2010 (R4, tab 14). Cooley timely filed this appeal from the CO’s final decision on 27 October 2010.

19. In its complaint appellant acknowledged that 100 pairs of copper splices and wiring were included in the scope of the specifications, which in turn were incorporated in White’s subcontract, and so it does not seek compensation for the \$2,500 cost to install those 100 pairs (compl. ¶¶ 22, 23).

20. In support of its opposition to the motion for summary judgment, appellant submitted the affidavit of RCDD Chris Pickett, a subcontractor employee on the OSP portion of the contract. RCDD Pickett stated that drawing T-401, detail 1, depicted 5,400 pairs of copper cable but did not indicate which of the cables were to be routed to the new communications building or how; the detail showed conduit running to the building but no wiring; that specification § 16711 was a performance specification under which the entire OSP system could be accommodated utilizing fiber optic cable or at most 100 pairs

of copper cable; the contract provided a riser diagram for fiber optic cable but not for copper cable; and he asked FLANG several times for required input, but did not receive the information requested (app. opp'n, Pickett aff. ¶¶ 2, 4, 6, 7, 10-11, 13).

DECISION

Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

Respondent argues that there are no genuine issues of material fact and it is entitled to judgment as a matter of law because the contract unambiguously required the relocation of 5,400 copper cable pairs to the new communications building (gov't mot. at 7). According to respondent, drawing T-401, detail 1, shows 5,400 pairs of copper wires running from Building 37 to the new communications building. It relies upon arrow notes stating the following copper cable counts: CA01, 1-900; CA02, 901-2400; CA03, 2401-3600; CA04, 3601-4500; CA05, 4501-5400. (*Id.*) Alternatively, it contends that any ambiguity in this respect was patent, appellant failed to seek clarification before bidding, and the ambiguity was resolved by the government's answer to pre-proposal question 5 (*id.* at 9-10).

Appellant counters that the contract is not ambiguous, that specification § 16711 was a performance specification which gave it discretion regarding how and with what materials to achieve the stated objective of a "complete outside plant telecommunications system for continuous use" and it could have satisfied that § 16711 requirement by extending 100 copper cable pairs or by use of fiber optic cable only (app. opp'n at 1, 5-7).

The present record shows disputed material facts that preclude summary judgment. The government points to RCDD Scott Brown's statement that, "there were requirements to move five (5) multi-pair cables" identified in drawing T-401, detail 1, as CA01-CA05 (which totaled 5,400 pairs) (SOF ¶ 17) and argues that drawing T-401, detail 1, unambiguously shows 5,400 copper cable pairs running from building 37 to the new proposed communications building (gov't mot. at 7). That statement was disputed, however, by appellant's affiant, Chris Pickett, who stated that drawing T-401, detail 1, showed conduit running to the building but no wiring and depicted 5,400 pairs of copper cable, but did not indicate which of the cables were to be routed to the new communications building or how. He opined that specification § 16711 is a performance specification under which the entire OSP system could be accommodated utilizing fiber optic cable. (SOF ¶ 20) Respondent does not dispute that specification § 16711 is a performance specification, but disputes whether the entire OSP system could be accommodated utilizing fiber optic cable, arguing that Mr. Pickett disregards the requirements of drawing T-401, detail 1 to extend 5,400 copper cable pairs to the new building (gov't reply br. at 4-6).

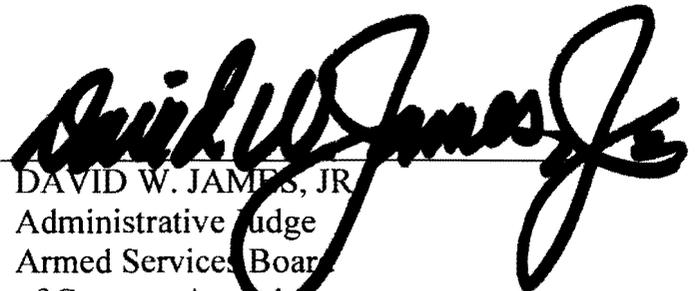
Moreover, the parties dispute whether on 11 February 2010 the government directed White “to furnish and install copper slices [sic] and wiring as depicted” on the MRD (SOF ¶ 14) and whether the OSP system could be installed with only 100 copper cable pairs (gov’t mot. at 7).

To resolve these disputes, the appeal record needs further development. *See Skanska US Building, Inc.*, ASBCA No. 56339, 10-1 BCA ¶ 34,392 at 169,834 (summary judgment denied, hearing needed to explain and clarify interpretations of drawings and specifications); *Osborne Construction Co.*, ASBCA No. 55030, 09-1 BCA ¶ 34,083 at 168,514 (when the meaning of contract provisions and the parties’ intentions are relevant and disputed, there are questions of fact making summary judgment inappropriate).

CONCLUSION

For the reasons analyzed above, we deny the motion for summary judgment.

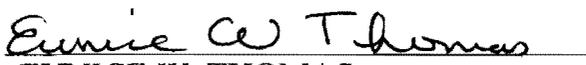
Dated: 12 October 2011



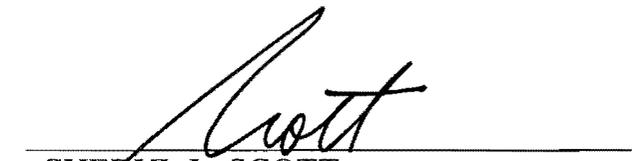
DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur



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



CHERYL L. SCOTT
Administrative Judge
Acting 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. 57404, Appeal of Cooley Constructors, Inc., rendered in conformance with the Board's Charter.

Dated:

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