

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Top Painting Co., Inc.) ASBCA No. 57333
)
Under Contract No. N62470-04-D-2410)

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Washington, DC

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

This appeal arises from the contracting officer's (CO) decision denying in its entirety the \$17,470.28 claim of Top Painting Co., Inc. (Top) for added costs to clean mold, mildew and rust from the surfaces of generator housings and fuel storage tanks to prepare them for painting under the captioned contract. The Board has jurisdiction of the appeal under the Contract Disputes Act (CDA) of 1978, 41 U.S.C. §§ 7101-7109. The government moved for summary judgment. Top responded to the motion. The government replied thereto. Our statement of facts is taken from the government's statement of undisputed material facts (GSMF) to the extent Top does not dispute it, the Rule 4 file and the parties' declarations.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 30 September 2004 the Resident Officer in Charge of Construction (ROICC) Camp Lejeune, North Carolina (NC), awarded indefinite delivery, indefinite quantity Multiple Award Construction Contract No. N62470-04-D-2410 (MACC contract) to Top, and equivalent MACC contracts to four other contractors, providing for

competitive solicitation and issuance of task orders (TO) for general painting and repair work at U.S. Marine Corps installations in NC (R4, tab 1 at 1¹, 9; GSMF ¶¶ 1-2).

2. The MACC contract, § C, provided that all TOs would be “non-complex *performance oriented tasks requiring minimal design*.... The awarded [TO] will be a performance scoped, firm fixed price task.” (R4, tab 1 at 9, emphasis added; GSMF ¶ 3)

3. The MACC contract incorporated by reference the FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984), 52.243-4, CHANGES (AUG 1987) and 52.236-3, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984) clauses (R4, tab 1 at 16; GSMF ¶¶ 4-5).

4. The Officer in Charge of Construction’s (OICC) 11 September 2008 email and letter to the MACC contractors requested proposals for a TO designated “**Project No. 08-0528, Paint Various Generators and Above Ground Storage Tanks (AST)**” for 58 buildings and stated: “You may contact the ROICC at (910) 451-2581 to inspect site conditions...” (R4, tab 9 at 470-72; GSMF ¶ 7).

5. Accompanying the 11 September 2008 letter was a document entitled, “N40085-08-B-0528 8M106CN Generator and AST Painting Project,” that stated:

The intent of this project is to paint various Generators, Above ground Storage Tanks (AST), piping and other metal surfaces in compounds located throughout MCB [Marine Corps Base] Camp Lejeune sites and MCAS [Marine Corps Air Station] New River. Provide a like new painted surface.... The intent of the lead work is to only remove, during the surface preparation process, what is necessary to provide a solid foundation for the application of the protective coatings.

....

SCOPE OF WORK: The Contractor shall:

Paint the interior and exterior surfaces of each generator housing. Paint the exterior surfaces of the fuel storage tanks, any exposed fuel piping that runs from the tanks shall be repainted and other surfaces addressed in scope. All surfaces to be painted are metal.

¹ All Rule 4 file page citations are to Bates numbers.

Where accessible, all of the above noted surfaces shall be scraped, sanded, wire brushed, or prepared utilizing an alternative method to provide a solid foundation for the primer. One coat of rust inhibitive primer shall be applied to all rusted areas and two finish coats of High gloss, "direct to metal" paint applied to all accessible surfaces.

....

The contractor must perform all work using industry approved and recognized standards....

....

GENERAL REQUIREMENTS:

1. The measurements furnished here are for reference only. The contractor is responsible for actual field verification prior to bidding, ordering materials, and during every step of construction for existing surfaces, dimensions, and conditions.

(R4, tab 10 at 473, 479; GSMF ¶¶ 7, 13, 14)

6. On 17 September 2008 Top submitted a proposal to the ROICC for the Project No. 08-0528 TO in the amount of \$113,000.00 (R4, tab 11; GSMF ¶ 9). There is no evidence that Top visited the site prior to submitting its proposal.

7. Navy personnel, including ROICC construction manager Mary Hathcock, thought that Top's proposal was "surprisingly low" (Hathcock decl. ¶ 6). On 18 September 2008 the OICC asked Top to confirm its bid price and to waive any and all claims of bid mistake after award of the TO (R4, tab 12; GSMF ¶ 10).

8. Top's 20 September 2008 letter to the ROICC stated: "This letter is to verify that we can do the above reference [sic] contract for our bid price, we understand the scope of the work and we can meet solicitation requirements, also we waive any and all claims of a bid mistake after the award of the [TO]..." (R4, tab 13 at 489; GSMF ¶ 10).

9. On 5 November 2008 the ROICC, NAVFAC Mid-Atlantic, awarded TO No. 0022 (TO 22) to Top for Project No. 08-0528 "in accordance with NAVFAC Specification No. 080528" (R4, tabs 14, 16 at 499; GSMF ¶ 11).

10. Prior to award of TO 22, Top performed under the MACC contract 20 other TOs that primarily concerned painting at Camp Lejeune MCB and New River MCAS² (Hathcock decl. ¶ 7; GSMF ¶ 12).

11. Top began work on TO 22 on 1 December 2008 (R4, tab 17 at 503; GSMF ¶ 15). On 2 December 2008 Top's superintendent Grigorios Mendonis told OICC engineering technician Jeffrey Enos that Top was not responsible for surface preparation for the majority of the TO 22 work (R4, tab 18).

12. Ms. Hathcock's 3 December 2008 email to Mr. Michael Aspiotis, president of Top, stated that TO 22 specified that "surfaces shall be scraped, sanded, wire brushed, or prepared utilizing an alternative method to provide a solid foundation for the primer" and all finished metal surfaces must receive proper surface preparation (R4, tab 19; GSMF ¶ 17).

13. Ms. Hathcock scheduled a meeting with Top at the OICC on 8 December 2008 to discuss, *inter alia*:

- * Surface preparation – Is contractor required to remove mildew from surfaces prior to painting?
- * Painting exhaust pipes – If rusted exhaust pipes are not painted, rain water may discolor painted surfaces.

(R4, tab 20)

14. NAVFAC Mid-Atlantic's 10 December 2008 email stated that at the meeting Mr. Mendonis "was adamant that factory finishes do not qualify as previously painted surfaces; that we should pay him for cleaning the mildew before painting the surface" (R4, tab 21; GSMF ¶ 18).

15. Top's 16 December 2008 letter to the ROICC requested a change order for "additional cost for preparation to clean the mildew" under TO 22 "By Powerwashing and Hand chemical cleaning" ASTs (R4, tab 22; GSMF ¶ 19). Ms. Hathcock's 17 December 2008 letter to Top declined to approve additional payment to remove mildew (R4, tab 23; GSMF ¶ 21).

16. Top sent two letters to Ms. Hathcock on 26 January 2009 concerning surface preparation. One letter stated that the mildew on the ASTs constituted a differing site condition (DSC) and, in addition, that other TOs had very specific language not present in

² None of those 20 TOs are in this appeal record.

TO 22 such as “[p]ressure wash any mold and mildew,” *e.g.*, for building 825 (R4, tab 24 at 641; GSMF ¶ 21). Another Top letter stated the following:

This letter concerns preparation procedures that we feel go beyond the intent of the contract. Some metal surfaces...are in such bad condition that they cannot be adequately cleaned for the application of primer by hand scraping, wire brushing, and sanding. In these more serious conditions, we must use power sanding, power wire brushing, and repeated strikes with a hammer to break away the rust in order to provide a quality product. These special actions are not considered normal preparation.

Examples of situations where special preparation methods are required include...Buildings RR15, NH120.... To date, we have performed special preparation on approximately 230 SF. We will charge \$1.75/sf for special preparation if the Government desires us to continue....

(R4, tab 24 at 644; GSMF ¶ 22)

17. Ms. Hathcock’s 28 January 2009 letter to Top denied its request for additional compensation for removing rust and mildew (R4, tab 25; GSMF ¶ 23). Her 9 February 2009 email to Top stated that the ROICC “cannot specify work methods” and Top had “to decide what methods are appropriate for completing the work required in the contract” (R4, tab 26 at 647).

18. Top’s 21 July 2009 letter to ROICC requested a change order for “additional cost for preparation beyond the intent of the contract” (TO 22) including removing heavy rust with power sanding, 6,740 SF x \$1.75 = \$11,795.00, and mold and mildew by pressure washing, 23,647 SF x 0.24 = \$5,675.28, totaling \$17,470.28, with break-downs by building numbers (R4, tab 30; GSMF ¶ 29).

19. Ms. Hathcock’s 10 August 2009 letter to Top stated that the claimed work was considered part of the contract and a contract modification was not warranted; she added that her letter was not a CO’s final decision (R4, tab 31; GSMF ¶ 30).

20. The 29 September 2009 letter of Top’s attorney requested a CO’s final decision on Top’s \$17,470.28 claim, alleging extra work “performed under the contract, but for which there were no provisions in the contract...to chemically clean and treat mold and mildew from fuel tanks and rail systems...[and] to perform heavy duty sand blasting and power sanding to remove heavy areas of rust from generator housing, fuel

tanks and rail systems” (R4, tab 32; GSMF ¶ 31). The CO’s 2 June 2010 decision denied that Top claim and this timely appeal followed (R4, tab 33; GSMF ¶ 32).

21. The government has filed a declaration of Ms. Hathcock in which she states:

4. At the time the Navy requested proposals for TO 0022, surface debris including, but not limited to, mold, mildew and varying amounts of rust were present and clearly visible on many of the exterior surfaces that are the subject of TO 0022. In the approximately seven weeks between solicitation and award for TO 0022, exterior surface conditions did not notably change.
5. On the eastern shore of North Carolina, where the military installations of MCB Camp Lejeune and MCAS New River are located, it is typical to find mold, mildew, rust and other surface debris on exterior metal surfaces such as the generators and above ground storage tanks that are the subject of TO 0022.

(Hathcock decl. ¶¶ 4-5) Ms. Hathcock’s foregoing statements are summarized in GSMF ¶ 8.

22. Top responded: “Appellant disputes the facts set out in this paragraph [GSMF ¶ 8] in that the amount of rust, mold, and mildew observed upon the start of work was in excess of the amount usually found on similar surfaces.” Top has filed a declaration from Mr. Mendonis who states:

2. ...I have worked in painting-related occupations in the Onslow County^[3] area in excess of thirty (30) years. I have personal knowledge of the facts of this case [TO 22]....
3. Based on my experiences painting in the area, once work began, I found the amount of rust, mold, and mildew on these surfaces to be in excess of the amount typically found on similar surfaces.
4. Neither I nor, based on information and belief, any management of Top Painting Co., Inc. interpreted the terms of the contract in question to require the use of power or chemical tools to remove of rust, mold, and mildew prior to painting. Instead, I and, based on information and belief, management interpreted

³ We take official notice that Camp Lejeune and New River MCAS are in Onslow County.

the preparation language to refer to hand sanding and similar methods. This interpretation was based on the fact that previous contracts had specifically included provisions for the removal of these conditions and our reliance on those contracts when interpreting the current contract.

(App. resp. at 2; Mendonis decl. ¶¶ 2-3)

Positions of the Parties

Movant relies on the Site Investigation clause and argues that there was no DSC or constructive change (gov't mot. at 18-23). Top argues that there are disputed issues of material fact. It states that it has presented two issues for decision: (1) whether the government's failure to specify such work as power sanding, pressure washing, chemically treating and performing other work to remove rust, mold, and mildew from the generator housings and ASTs makes its requirement to correct such surface conditions outside the scope of the initial contract; and (2) whether the extent of those surface conditions and amount of work necessary to correct them constitute a DSC (app. resp. at 1-2).

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). There is a genuine issue of material fact if the evidence is such that a reasonable fact finder could find in favor of the non-movant. *Anderson*, 477 U.S. at 248-49. The movant has the burden to establish the absence of disputed material facts. Once done, the non-moving party must set forth specific facts, not conclusory statements or bare assertions, to defeat the motion. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 739 F.2d 624, 627 (Fed. Cir. 1984).

We turn first to whether there is any genuine issue of material fact. Though Top seeks to raise an issue of disputed fact with respect to whether the extent of rust, mold and mildew on the generator housings and ASTs at the times of the solicitation and contract award was typical of amounts found on similar surfaces (SOF ¶¶ 21, 22), those facts are not material. The controlling material facts in Ms. Hathcock's declaration, ¶ 4, that at the time the Navy requested proposals for TO 22, surface debris including mold, mildew and varying amounts of rust were present and clearly visible on many of the exterior surfaces that are the subject of TO 22, are undisputed (SOF ¶ 21, *cf.* SOF ¶ 22).

We decide next whether the site conditions Top encountered under the contract were a DSC (Top's second issue). Top argues that the extensive rust, mold and mildew

that it encountered on the TO 22 generators and ASTs in early December 2008 (SOF ¶¶ 11-13) constituted a DSC. The FAR 52.236-2 DIFFERING SITE CONDITIONS (APR 1984) clause provided, in pertinent part:

(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the [CO] of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

Visible rust, mold and mildew on the generator housing and AST surfaces when Top submitted its proposal for the contract do not qualify as a DSC under the quoted DSC clause, since they were neither “subsurface or latent” nor “unknown.” Furthermore, since Top did not make a pre-award site visit to ascertain the conditions and the extent of rust, mold and mildew on the metal surfaces of the generators and ASTs (SOF ¶ 6), it assumed the risk for the conditions and extent of rust, mold and mildew on the generators and ASTs actually encountered, pursuant to TO 22’s FAR 52.236-3, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984) clause (SOF ¶ 3). *See Randa/Madison Joint Venture III v. Dahlberg*, 239 F.3d 1264, 1270-72 (Fed. Cir. 2001) (in a contract having a site investigation clause, the contractor has no claim if the missing information could have been obtained through the inquiries contemplated).

We turn next to Top’s first issue, whether the contract required Top to correct the foregoing site conditions. The requirements in TO 22’s SCOPE OF WORK, “surfaces shall be scraped, sanded, wire brushed, or prepared utilizing an alternative method to provide a solid foundation” (SOF ¶ 5), did not require the method of surface preparation to be by hand or by power tools. Rather, they were performance requirements which included both hand and power tools.

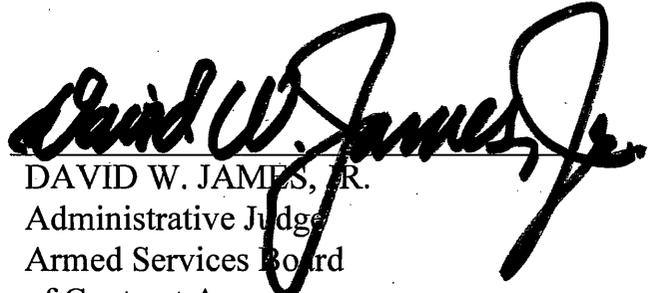
Top contends that since previous contracts had specific provisions to use power or chemical tools to remove rust, mold and mildew, it interpreted the TO 22 provision, “surfaces shall be scraped, sanded, wire brushed, or prepared utilizing an alternative method,” not to require the use of power tools (SOF ¶ 22; Mendonis decl. ¶ 4). Top’s interpretation provides no valid basis to ignore the plain language of the foregoing TO 22 provision, which required surface preparation to provide a solid foundation for painting, but did not specify whether to use hand or power tools. There is no triable issue with respect to such provision. Therefore, we hold that respondent properly required Top to correct the conditions of rust, mold and mildew on the generator housing and AST surfaces so as to comply with TO 22’s surface preparation requirements. Such correction was not a constructive change.

We have considered Top's other arguments and do not find them persuasive.

CONCLUSION

We grant the government's motion for summary judgment and deny the appeal.

Dated: 18 April 2012



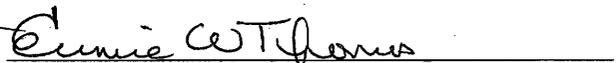
DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



MARK N. STEMLER
Administrative Judge
Acting Chairman
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. 57333, Appeal of Top Painting Co., Inc., rendered in conformance with the Board's Charter.

Dated:

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