

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Jaynes Corporation) ASBCA No. 58288
)
Under Contract No. W912PL-09-C-0009)

APPEARANCE FOR THE APPELLANT: Judith Ward Mattox, Esq.
Colorado Springs, CO

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
John F. Bazan, Esq.
Engineer Trial Attorney
U.S. Army Engineer District, Los Angeles

OPINION BY ADMINISTRATIVE JUDGE TUNKS

Jaynes Corporation (appellant or Jaynes) seeks an equitable adjustment of \$51,358 for providing a Level 5 finish *in lieu* of a Level 4 finish and orange peel texture for gypsum board. Jaynes has elected to have its appeal processed in accordance with Board Rule 12.3 and the parties have agreed to submit the appeal on the written record pursuant to Board Rule 11. Only entitlement is at issue.

FINDINGS OF FACT

1. On 30 March 2009, the government awarded a firm-fixed price contract in the amount of \$5,806,407 to Jaynes for a design build contract for an Unmanned Aircraft System Flight Simulator and Academics Facility at Creech Air Force Base (AFB), Nevada (R4, tab 3 at JC00139-40, tab 5 at JC01737). The work included the design and construction of a new pre-engineered building, including site improvement, utilities, landscaping, roads/parking, communications support and all other necessary support for the project (R4, tab 5 at JC01740). Request for Proposal No. W912PL-09-R-0002 (RFP) led to award of the contract (R4, tab 3 at JC00139).

2. RFP section 01 10 12, "DESIGN AFTER AWARD," provided, in part, as follows:

1.0...The criteria specified in this RFP are binding contract criteria. In case of any conflict between the RFP criteria and Contractor's submittals, the RFP criteria will govern unless

there is a written and signed agreement between Contracting Officer and Contractor waiving a specific requirement.

....

1.2 Order of Design Criteria Precedence

Section 01 10 10 is intended to identify specific project requirements. In cases of criteria conflict, Section 01 10 10 holds precedence over all other criteria mentioned or referenced. Guide specifications define minimum material quality requirements for material and installation.

(R4, tab 5 at JC02016)

3. RFP section 01 10 10, "SPECIFIC TECHNICAL ENGINEERING AND DESIGN CRITERIA," "Applicable Building Codes and Standards," provided, in part, as follows:

The following codes, standards and publications provide minimum criteria and shall be met or exceeded. Use the latest editions, unless noted otherwise. If requirements conflict, the most stringent requirement shall be utilized in the design and construction[.]

(R4, tab 5 at JC01951)

4. RFP section 01 10 10 made the "DESIGN COMPATIBILITY GUIDELINES, NELLIS AFB, NV" (Nellis Guidelines), applicable to the design effort (R4, tab 5 at JC01952). Paragraph 6.4 of the Nellis Guidelines provided, in part, as follows:

- *Gypsum Boards*: All gypsum board surfaces, which are to be painted, shall receive an "orange peel" texture prior to painting.

....

- *Paint*: Use an eggshell latex on all surfaces except metal which shall be a semi-gloss enamel.

(R4, tab 10 at JC02581)

5. RFP section 01 10 12, "DESIGN AFTER AWARD," provided, in part, as follows:

10.0 SPECIFICATIONS

Specifications for construction shall be prepared utilizing United Facilities Guide Specifications [UFGS] which shall be the minimum basis for quality and product selection/installation.... The Contractor shall edit the guide specifications, but edits shall conform to the specific minimum requirements of this RFP and are subject to approval by the Government.

[Paragraph 10.0 identified the guide specification for gypsum board as 09 29 00].

(R4, tab 5 at JC02025-26)

6. The applicable version of guide specification 09 29 00 is October 2006. Specification 09 29 00 provides, in part, as follows:

3.4 FINISHING OF GYPSUM BOARD

...Finish plenum areas above ceilings to Level 1 in accordance with GA 214. Finish water resistant gypsum backing board, C 630/C 630M, to receive ceramic tile to Level 2 in accordance with GA 214. Finish walls and ceilings to receive a heavy-grade wall covering or heav[y] textured finish before painting to Level 3 in accordance with GA 214. Finish walls and ceilings without critical lighting to receive flat paints, light textures, or wall coverings to Level 4 in accordance with GA 214. Finish all gypsum board walls, partitions and ceilings to Level 5 in accordance with GA 214....

3.4.1 Uniform Surface

Wherever gypsum board is to receive eggshell, semigloss or gloss paint finish, or where severe, up or down lighting conditions occur, finish gypsum wall surface in accordance with GA 214 Level 5.

(Bazan decl., ex. 1 at 23-23)

7. Under date of 20 January 2010, Jaynes submitted the 95% design. Jaynes edited specification 09 29 00 ¶ 3.4 to delete the sentence referring to Level 5. It also deleted ¶ 3.4.1. As edited by Jaynes, and renumbered ¶ 3.3, former ¶ 3.4 now read in pertinent part:

Finish plenum areas above ceilings to Level 1 in accordance with GA 214. Finish water resistant gypsum backing board, ASTM C 630/C 630M, to receive ceramic tile to Level 2 in accordance with GA 214. Finish walls and ceilings to receive a heavy-grade wall covering or heav[y] textured finish before painting to Level 3 in accordance with GA 214. Finish walls and ceilings without critical lighting to receive flat paints, light textures, or wall coverings to Level 4 in accordance with GA 214.

(Supp. R4, tab 23 at JC002696)

8. Mr. Robert F. Caskie, the project engineer/administrative contracting officer (ACO) and contracting officer's representative (COR), reviewed the 95% design (Caskie decl. at 1-2). He noticed that Jaynes had deleted the Level 5 design finish requirement and added wall textures. Mr. Caskie directed his assistant to send a message to Jaynes directing them to add Level 5 finish back into the design and delete wall textures. (*Id.* at 2-3)

9. On 11 February 2010, Mr. Caskie's assistant issued a "DrChecks" to Jaynes.

Spec para 09.29.00-3.3 has been edited to delete Level 5 finish. Add back in. All interior gypsum board wall shall receive Level 5 finish. Also modify spec section 09 90 00 [Paints and Coatings] - 1.4.2 & 1.4.3 to delete texture sample areas - wall textures shall not be allowed.

(R4, tab 9 at JC02577) Jaynes replied that the Nellis Guidelines required an orange peel texture which, in turn, was indicative of a Level 4 finish (*id.*).

10. Under the date of 30 July 2010, Jaynes submitted the 100% Design Specification. In accordance with the government's DrCheck comment, it re-edited ¶ 3.3 to provide "[f]inish all gypsum board walls, partitions and ceilings to Level 5...." (Supp. R4, tab 24 at 6, JC002709)

11. The government approved the 100% design. Mr. Caskie stated that he would not have found the 100% specification satisfactory if the Level 5 finish requirement was deleted and the texture requirement was left in (Caskie decl. at 3).

12. On 11 February 2011, Jaynes submitted RFI # 0064:

[Question]:

It has been requested that the contractor provide a Level 5 finish to the interior gypsum walls; however, Nellis Design Guidelines clearly indicated that all interior walls are to receive an orangepeel [sic] texture (see Section 6.4). Specifications call for walls that are to receive light texture to be finished at Level 4. This question[] was also raised during the design phase of the project (see attached Dr Checks closed comment). Please advise if a level 5 finish will be required.

[Answer]:

Please provide a [Le]vel 5 wall finish as stated in contract Specification section 09 29 00-3.3, page 6.

(R4, tab 7)

13. On 21 March 2011, Jaynes requested a change order in the amount of \$51,358 for providing a Level 5 finish (R4, tab 14).

14. On 11 April 2011, Jaynes submitted a claim in the amount of \$51,358. The letter provided, in part, as follows:

[The] RFP...directed the offerer [sic] to follow the Nellis [Guidelines]. Section 6.4...state[s] that "all gypsum board surfaces, which are to be painted, shall receive an 'orange peel' texture prior to painting." The UFGS Masterspec (09 29 00.3.4) indicates that walls to receive light textures are to be finished to a Level 4 in accordance with GA-214.

During design development, the guide specifications were edited to remove the requirements for a Level 5 finish. We received a comment in Dr Checks (3056380) that required the edited portion be replaced requiring the use of a Level 5 finish and denying the use of any textures. We responded that this was in direct conflict with the RFP and [Nellis Guidelines]. The comment was closed by the government.

During construction Jaynes sought clarification on this issue and was directed to provide a Level 5 finish for the drywall....

(R4, tab 15)

15. On 11 May 2012, Jaynes requested a final decision on its claim (R4, tab 16).

16. On 15 August 2012, Jaynes appealed the deemed denial of its claim to this Board where it was docketed as ASBCA No. 58288 on 20 August 2012.

17. On 27 August 2012, the CO issued a final decision denying the claim.

DECISION

In interpreting a contract, we apply the following principles:

[T]he intention of the parties must be gathered from the whole instrument. [A]n interpretation which gives a reasonable meaning to all parts of an instrument will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous; nor should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible. [Citations omitted]

Hol-Gar Manufacturing Corp. v. United States, 351 F.2d 972, 979 (Ct. Cl. 1965).

Applying the foregoing principles here leads us to the conclusion that Jaynes must prevail. The government argues that Section 01 10 12 ¶ 10.0 requires that the guide specification “shall be the minimum basis for quality and product selection/installation” (gov’t br. at 9; finding 5). The government’s interpretation of Section 01 10 12 leaves portions of Section 01 10 10 and paragraph 6.4 of the Nellis Guidelines inoperative, meaningless, and useless. In particular, it ignores the requirement that the contractor provide an “orange peel” texture on all gypsum board prior to painting which in turn indicates a Level 4 finish. In the event of a conflict between criteria, Section 01 10 10 was to take precedence over all other criteria mentioned or referenced. The Nellis Guidelines were part of Section 01 10 10. Moreover, Paragraph 10 of UFGS, referenced in Section 01 10 12, contemplated that the UFGS would be edited by the contractor. The Nellis Guidelines, on the other hand, required the contractor to meet or exceed those guidelines. Thus, deleting texture and directing Jaynes to provide a Level 5 finish for gypsum board is a change to the contract.

The government also argues that the 100% final design required a Level 5 finish (gov't br. at 12). That is correct, but appellant made that change to meet the ACO's requirements (findings 8-11). We have considered the government's other arguments but do not find them persuasive.

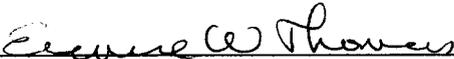
The appeal is sustained. Quantum is remanded to the CO. In the event the parties cannot agree on quantum, the CO is directed to issue a final decision from which further appeal may be taken.

Dated: 15 February 2013



ELIZABETH A. TUNKS
Administrative Judge
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. 58288, Appeal of Jaynes Corporation, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals