ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Maintenance Engineers	)	ASBCA No. 50150
	)	
Under Contract No. N68711-93-D-1937	)	

APPEARANCE FOR THE APPELLANT: Timothy H. Power, Esq.
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APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.
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OPINION BY ADMINISTRATIVE JUDGE YOUNGER

In this appeal under a grounds maintenance contract, appellant contends that respondent constructively changed the contract by directing the replacement of existing vegetation in parking lot islands with ice plant requiring more time and manpower to maintain. Respondent denies that there was a change and urges that, in any event, appellant's interpretation creates a patent ambiguity that was not clarified before bid. Only entitlement is before us. We deny the appeal.

FINDINGS OF FACT

1. By date of 29 October 1993, respondent awarded appellant Contract No. N68711-93-D-1937 for grounds maintenance at the Serra Mesa housing area, Camp Pendleton, CA (R4, tab 1 at 1). The contract followed the submission of sealed bids and was a firm fixed price indefinite quantity contract containing various standard clauses.

2. The contract also contained specifications. Clause C.2, DEFINITIONS - TECHNICAL, contained paragraph k, ZONE MAPS, which were defined as "[l]ocally produced drawings outlining the grounds maintenance areas within different localities of Camp Pendleton, showing grounds maintenance levels, detail schedules and the inventory of work items in each zone" (R4, tab 1 at C-3). Clause C.5, CONTRACT REQUIREMENTS, provided that such tasks were to "be performed in accordance with the Performance Requirements Summary (PRS) Attachment J-C3 and the detailed specifications in clause C.6." Clause C.5.2.1 provided: "Contract Requirement No. 001: Grass cutting and trimming, Level I. . . ." (*Id*. at C-4) We find that the contract contains no comparable requirement for grass cutting in Level II (GX 6; tr. 127-29). Clause C.5.2.3 provided: "Contract Requirement

No. 003: Provide chemical weed control for lawns, side walks and driveways, Levels I and IV . . . ." (R4, tab 1 at C-5) We find that the contract contains no comparable requirement for chemical weed control in Level II (GX 6; tr. 129). Clause C.5.24 provided: "Contract Requirement No. 024. Indefinite Quantity Work. Renovate ground cover. . . ." (R4, tab 1 at C-10)

3. The contract also contained clause C.6, DETAILED SPECIFICATIONS. Clause C.6.1, GENERAL:

> . . . identifie[d] the level and type of grounds maintenance each parcel of land is to receive. There are five (5) maintenance levels: Level I (improved lawn areas), Level II (improved planted areas), Level III (unimproved areas), Level IV (embankments improved areas); and Level V (embankments unimproved areas). The types of work required for each level are identified below. Attachment J-C2 (Zone Maps) identifies the location, size and maintenance level for each parcel of land . . . .

(R4, tab 1 at C-12, C-13) Only Level II areas are at issue in this appeal. Clause C.6.1.1, MAINTENANCE LEVELS I AND II, provided that "[l]awn areas are to be maintained in a manner that promotes proper health, growth, natural color, and neat appearance" (*id*. at C-13). Other paragraphs within clause C.6.1.1 related to grass cutting and chemical lawn weeding (*id*. at C-13, C-14). Clause C.6.1.1 also contained paragraph g, which provided:

> Ice Plant and Other Ground Cover. Ice plant and other ground cover shall be trimmed or edged on both sides of fences, ditches, gutters, shrubs, trees, paving, including sidewalks and curbs. Ice plant and other ground cover shall not be permitted to grow on fences, walls and buildings, and shall be removed.

(*Id*. at C-15) Paragraph g, like the other paragraphs within clause C.6.1.1 relating to grass cutting and chemical lawn weeding, did not specify whether the designated tasks applied to Level I, Level II, or both (*id*. at C-13, C-14). Clause C.6.1.9, INDEFINITE QUANTITY WORK, contained paragraph c, RENOVATE GROUND COVER, which provided that "[t]he Contractor shall renovate, dethatch, re-plant and fertilize ice plant and other ground cover under indefinite quantity work" (*id*. at C-21).

4. The zone maps in Attachment J-C2 divided the performance area into 19 zones (*id*. at J - C1 to J-C2 (20); *see also* finding 2). Only zones 1 through 10 are at issue in this appeal. Within each of these zones, separate areas were indicated by different patterns of lines corresponding to a legend to specify whether the areas were to receive maintenance Level I, II, III, IV or V (*id*. at J-C2(2) to J-C2(11)). Another legend on the maps for zones 1 -10 set forth the square footage in each zone for " LAWNS (LEVEL I)" and " GRD.

COVER/FLOWER/SHRUB/HEDGE BEDS (LEVEL II)" (*id.*). The level I and II areas in zones 1-10 are the parking lot areas in these zones.

5. The contract does not define ground cover (tr. 82). We find that, in accepted landscape terminology, ground cover is commonly differentiated from lawn. The record contains an excerpt from *THE NATIONAL ARBORETUM BOOK OF OUTSTANDING GARDEN PLANTS* stating that "[a]ny plant can be considered as ground cover, but the most resistant and useful are the . . . low-growing forms that naturalize and multiply, keeping everything else out" (GX 1a at 102). The record also contains an excerpt from the *TIME-LIFE ENCYCLOPEDIA* stating that "the term ' ground cover' applies to any vegetation that blankets the soil, from moss to pine forest. In horticulture, . . . it means low-growing plants in close proximity, used to adorn areas that otherwise would have only grass, or would remain bare" (GX 1c at 104). The record further contains testimony characterizing ground cover as ivy or ice plant (tr. 29, 113, 119). The contract administrator testified, and we find, that "you do not mow or aerate ground cover" (tr. 91).

6. Appellant's president testified that, before bidding in May 1993, he made a site visit (tr. 9). He testified that the Level II areas that he saw were "a weed patch" containing grass, weeds and "one or two shrubs" (tr. 11). He further testified that, if he did see ice plant in zones 1-10, it was "insignificant" or "nil" (tr. 18). In formulating appellant's bid, he testified, he took the vegetation that he saw into account and concluded that appellant could perform the contract in these areas by mowing, weed-whipping, or employing herbicide in these areas (tr. 14-15, 17, 27-29, 36-37). The record does not contain appellant's bid documents.

7. The record contains 15 still photographs extracted from a videotape taken on 14 September 1993, in the interval between bid and award (GX 7A-7O; tr. 108, 114). We find that the conditions depicted in these photographs were roughly the same as those in the Level II, zones 1-10, areas at the time of bid (tr. 114). We further find that these areas then contained some ground cover, consisting of ice plant (GX 7A-7C, 7E, 7G, 7H; tr. 113-14) and lavender bushes (GX 7I, 7J, 7L-7O; tr. 114).

8. Appellant did not make any pre-bid inquiries (tr. 124). The parties did, however, hold a pre-award meeting in July 1993, which respondent convened out of concern that appellant lacked sufficient staff to perform (tr. 91). We find that appellant's vice president stated that appellant intended to mow the Level II areas in zones 1-10, as he had observed the incumbent contractor doing, and that he received no objection from respondent' s representatives (tr. 52-53, 93-94). We further find that the contract administrator, who attended the meeting, had not then been out in the field, did not know the conditions either at the time of bidding or of the pre-award meeting, and was unaware that the incumbent contractor was mowing the Level II areas (tr. 93-95, 99). We find no evidence that the contract administrator had the authority to change contract requirements (*cf.* tr. 91, 123-24).

9. By date of 12 April 1995, respondent issued delivery order No. 2 requiring appellant to " RENOVATE LEVEL II GROUND COVER IN ZONES 1 - 10, SERRA MESA HOUSING AREA AS LISTED BELOW AND AT LOCATIONS IDENTIFIED ON ATTACHED ZONE MAPS" (R4, tab 2 at 4-9). The description of the work in the delivery order cited item No. 0012AC in the bid schedule, which was for "Renovation of Ground Cover (Per PRS item 0024)" (*id*. at 5; R4, tab 1 at B-12). In turn, the PRS described the work requirement for item No. 0024 as: "Contractor shall renovate Ground Cover in areas required by delivery order and in accordance with . . . Specifications," citing clauses C.5.2.24 and C.6.1.9.c. (R4, tab 1 at J-C3(21); *see* findings 2, 3)

10. In performing delivery order No. 2, appellant killed and removed grasses and weeds in the affected areas and planted red apple ice plant in them (tr. 63).

11. By letter to the contracting officer dated 1 December 1995, appellant submitted a certified claim for "$1,608.00 per month starting 15 June 1995 and continuing until the completion date of this contract," representing allegedly higher maintenance costs resulting from the installation of ice plant in the Level II areas in zones 1-10 (R4, tab 4 at 1-2). Thereafter, by decision dated 20 June 1996, the contracting officer denied the claim (R4, tab 6).

DECISION

In seeking an equitable adjustment, appellant principally contends that delivery order No. 2 constituted a change to the contract because the ice plant that it called for required more time and manpower to maintain than the vegetation that was previously in the Level II areas of zones 1-10. (App. opening brief at 10-11) Appellant urges that paragraph C.6 of the specifications (*see* finding 3) grouped maintenance Levels I and II together, and hence supported appellant's interpretation that it was required to maintain Level II grassy areas as the previous contractor had done. (App. reply brief at 2-4) Appellant further urges that its bid price "was based upon mowing the [Level II] areas" in zones 1-10, that it interpreted the contract to permit mowing of maintenance Level II areas and that it had no duty to seek pre-bid clarification because respondent was aware of its interpretation from pre-award discussions. (*Id*. at 5-8) For its part, respondent insists that the contract, taken as a whole, distinguishes between lawn areas and ground cover. (Respondent's post-hearing brief at 15-16) Respondent also stresses that appellant's interpretation of the contract created a patent ambiguity, giving rise to a duty to inquire, which appellant failed to perform (*id*. at 16-20).

We conclude that the appeal must be denied for four principal reasons. First, delivery order No. 2 comported with contract requirements. Only maintenance Level II areas are at issue in this appeal (finding 3). The Detailed Specifications defined Level II areas in clause C.6.1 as "planted areas," in contradistinction to the "lawn areas" in Level I (*id*.). In addition, the contract complemented the maintenance level designations with zone maps specifying the location of the areas at issue, distinguishing between " LAWNS (LEVEL

I)" and " GRD. COVER/FLOWER/SHRUB/HEDGE BEDS (LEVEL II)" (findings 2, 4). Delivery order No. 2 required appellant to "renovate level II ground cover in zones 1-10," citing the bid schedule item for "Renovation of Ground Cover" and the PRS work requirement that appellant "renovate Ground Cover" (finding 9). We have found that ground cover did, in fact, exist in the areas at issue (finding 7), and it therefore could be renovated. While the contract does not define "ground cover," accepted landscape terminology clarifies that it signifies low-growing plants such as the ice plant provided for in clause C.6.1.1 and installed under the delivery order (findings 3, 5, 9, 10).

Second, appellant's alleged bidding assumptions regarding mowing, weeding and employing herbicide in the areas at issue were unreasonable (*see* finding 6). Even if appellant met its burden of proving reliance by "general testimony that it bid in a manner consistent with its [present] interpretation," *Bodell Construction Company*, ASBCA No. 38355, 92-1 BCA ¶ 24,433 at 121,929, we have found that the areas in dispute contained ice plant and lavender at the time of bid (finding 7). Clause C.5.2.1 limits grass cutting -- mowing -- to Level I areas (finding 2). In addition, employing herbicides in Level II areas is not consistent with clause C.5.2.3 (*id*.). In any event, the blunt testimony that "you do not mow or aerate ground cover" (finding 5) reinforces what common sense and community experience teach.

Third, we reject appellant's argument regarding the grouping of Levels I and II in the Detailed Specifications. We agree that paragraph C.6.1 addresses Levels I and II together, while addressing the other three maintenance levels in separate paragraphs (*see* finding 3). Seemingly, appellant reasons that, because clause C.6.1.1 contains paragraphs relating to grass cutting and chemical lawn weeding (*see id*.), these and other defined tasks may therefore be performed in Level II areas. However, clause 6.1 must be read in harmony with clause C.5, and that clause does not require grass cutting or chemical lawn weeding in Level II (finding 2).

Fourth, we reject appellant's argument regarding the pre-award conference. Appellant urges that, inasmuch as respondent's representatives did not object to its statement that it intended to mow the Level II areas respondent is bound. (App. reply brief at 5-9) The argument is comparable to one that we rejected in *ASC Systems Corp*., ASBCA No. 22104, 78-1 BCA ¶ 13,209 at 64,631, holding that "when the contract requirements are clear, the silence or contrary agreement by Government representatives not empowered to change those requirements, does not estop enforcement thereof." In *ASC Systems*, the contractor contended "that it informed respondent of its understanding of [a contract] clause . . . at the pre-award conference . . . and that respondent expressed no different interpretation prior to award." We found, however, "no evidence of any acquiescence by respondent's representatives in the interpretation now urged by appellant." We concluded that respondent was not bound by appellant's statements at the pre-award conference. Other cases are to the same effect. *E.g*., *Sanders Industries, Inc.*, ASBCA No. 21360, 78-1 BCA ¶ 13,169 at 64,379 (upholding a default termination for submission of nonconforming first articles notwithstanding alleged disclosures at pre- and post-award

conferences that disapproved parts would be included); *T. M. Industries, Inc.*, ASBCA No. 19090, 75-1 BCA ¶ 11,075 at 52,720 (same).

The record here is weaker for appellant than in *ASC Systems*. Whatever force appellant's utterances at the pre-award conference might have is undercut by the contract administrator's ignorance of the site conditions in the areas at issue at that time (finding 8), and hence we would be reluctant to attribute significance to his silence. In addition, the record does not show that he had authority to change contract requirements (finding 8), which we have concluded are clear. Following *ASC Systems*, we cannot accede to appellant's argument.

CONCLUSION

The appeal is denied.

Dated: 28 November 2000

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

MARK N. STEMPLER
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. 50150, Appeal of Maintenance Engineers, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals