ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
De Narde Construction Company	)	ASBCA No. 50288
	)	
Under Contract No. N62474-82-C-0627	)	

APPEARANCE FOR THE APPELLANT: C. Kevin Bond, Esq.
San Diego, CA

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.
Navy Chief Trial Attorney
John S. McMunn, Esq.
Senior Trial Attorney
Naval Facilities Engineering Command
San Bruno, CA

OPINION BY ADMINISTRATIVE JUDGE TUNKS
PURSUANT TO RULE 11

Appellant requests an equitable adjustment of $202,228 for installing braces on one building and one piece or full height vertical reinforcing bars (rebar) in six other buildings, alleging that the contract was ambiguous and that the Government agreed to appellant's interpretation prior to the commencement of construction. The parties have elected to proceed under Board Rule 11. Only entitlement is before us.

FINDINGS OF FACT

1. The Government issued Invitation for Bids (IFB) No. N62474-82-B-0627 for the construction of an Automotive Organization Shop consisting of seven one-story buildings at the Marine Corps Base, Camp Pendleton, California, on 8 August 1986 (R4, tab 1).

2. In addition to FAR 52.233-1 DISPUTES (APR 1984) and FAR 52.243-4 CHANGES (APR 1984), the contract included the following clauses which are relevant, in part, to this dispute:

FAR 52.214-6 EXPLANATION TO PROSPECTIVE BIDDERS (APR 1984)

Any prospective bidder desiring an explanation or interpretation of the solicitation, drawings, specifications, etc., must request it in writing [prior to submitting its bid] . . . .

. . . .

FAR 52.236-21 SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984)

(a) . . . Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern.

. . . .

(c) Where "as shown," "as indicated", "as detailed", or words of similar import are used, it shall be understood that the reference is made to the drawings accompanying this contract unless stated otherwise.

. . . .

FAR 52.246-12 INSPECTION OF CONSTRUCTION (APR 1986)

. . . .

(d) The presence or absence of a Government inspector does not relieve the Contractor from any contract requirement, nor is the inspector authorized to change any term or condition of the specification without the Contracting Officer's written authorization.

(R4, tab 1)

3. Specification section 01011 (General Paragraphs Supplement) included the following clauses which are relevant, in part, to this appeal:

1.10 ORAL MODIFICATION: No oral statement of any person other than the contracting officer or his representative . . . shall . . . modify or . . . affect the terms of this contract.

1.11 NO WAIVER BY GOVERNMENT: The failure of the Government . . . to insist upon . . . strict performance. . . shall not be construed as a waiver . . . of the right to assert or rely upon such terms . . . on any future occasion.

. . . .

1.14 CONTRACTOR QUALITY CONTROL (CQC):

. . . .

(b) The Contractor shall provide a CQC representative . . . who shall be on the work at all times during progress, with complete authority to take any action necessary to ensure compliance with the contract.

4. Specification section 04230 (Reinforced Masonry) provided, in part, as follows:

1.2 QUALITY CONTROL:

1.2.1 Continuous Inspection: Employ a qualified masonry inspector approved by the Contracting Officer in addition to the [CQC] Representative to perform continuous inspection of the masonry work. . . .

. . . .

3.5 PLACING REINFORCING STEEL: . . . Provide one piece vertical bars extending from floor to floor to floor or roof above. Splice vertical bars only where indicated.

. . . .

3.5.2 Splices: Locate splices only as indicated.

5. Drawing S-1 (General Notes & Abbreviations) contained the following relevant notes:

MASONRY:

1. . . . All units shall be open end units.

. . . .

3. [Rebar] shall lap a minimum of 40 bar diameters . . . unless otherwise noted.

6. Drawing S-2 (Typical Details) contained a chart entitled "REINFORCEMENT LAP SPLICES IN INCHES" (R4, tab 1). Note 1 of that detail stated as follows:

VERTICAL WALL REINFORCING SHALL BE SPLICED AS FOR TOP BARS, BUT NO LESS THAN 30 BAR DIAMETERS.

7. Drawing S-12, the foundation plan for Building #5, contained a note requiring full height rebar at masonry openings (jamb bars). The note stated, in part, as follows:

#5 JAMB BARS &
#5 @ 8 FULL
HT WALL

(R4, tab 1)

8. Drawings S-8 (Partial Foundation Plan Building #4), S-9 (Partial Foundation Plan Building #4), S-14 (Foundation Plan & Roof Framing Plan Building #6) and S-17 (Wall Sections & Details) contained notes similar to those on Drawing S-12 (R4, tab 1).

9. The drawings do not show spliced vertical rebar at any location (R4, tab 1).

10. Mr. Walter Priebe, an estimator employed by Alliance Masonry & Fence Company (Alliance), appellant's masonry subcontractor, prepared the masonry portion of appellant's bid (Priebe decl. at ¶ 2). Although Mr. Priebe stated in his declaration dated 3 February 1999 that he interpreted the contract to permit the use of spliced vertical rebar, appellant did not introduce its bid documents into evidence (Priebe decl. at ¶ 3; Rhone decl. at ¶ 6; R4, tab 21). Other evidence in the record contradicts Mr. Priebe's declaration. A few days after the noncompliance was discovered, representatives of appellant, including Mr. David De Narde, appellant's president, Mr. Alvin Beller, appellant's job superintendent, and Mr. Fred Higgison, appellant's Contractor Quality Control (CQC) representative at the time, admitted to Mr. Floyd H. Rhone, the Government's Construction Representative (CR), that "we all knew about [the]

requirements." We just "[g]ot caught." (Rhone decl. at ¶ 26; CR Report No. 88/89 of 23 February 1987). By letter dated 14 March 1987, Mr. Dewey W. Rowe, the owner of Alliance, advised appellant that his company was "fully cognizant" of a conflict between the specifications and the drawings during bid preparation (attachment to Lenda decl.). Given these facts, we are unable to conclude that appellant based its bid on spliced vertical rebar.

11. Appellant did not submit a prebid inquiry regarding the rebar (Rhone decl. at ¶ 6; Thomsen decl. at ¶ 23; R4, tab 21).

12. The Government awarded Contract No. N62474-82-C-0627 to appellant on 30 September 1986 (R4, tab 1).

13. Building #5, the first building to be constructed, was a one-story structure with 20 feet high masonry walls enclosing an area of 7,495 square feet. Camp Pendleton is in a Seismic Zone 4 earthquake zone (R4, tab 7; Thomsen decl. at ¶¶ 6, 7). Masonry work on Building #5 began on or about 15 December 1986 (R4, tab 3).

14. During a site visit on 20 February 1987, Mr. Steen T. Thomsen, the structural engineering consultant hired by the architect/engineer (A/E), observed Alliance installing spliced vertical rebar (Thomsen decl. at ¶ 25; CQC Report No. 86 dated 2/20/87; Contractor's Daily Report to Inspector No. 89 dated 20 February 1987). As of that date, Building #5 and the first lift of Building #6 had been completed (R4, tab 19).

15. Mr. Rhone, the Government's CR, issued Compliance Notice No. 3 on the same date, halting all masonry work pending an investigation of the integrity of the building (R4, tabs 3, 4; Rhone decl. at ¶ 15).

16. On 14 March 1987, Mr. Rowe, the owner of Alliance, advised appellant that it had discussed grouting and steel placement procedures with an unidentified representative of the Office of the Resident Officer in Charge of Construction (ROICC office) prior to starting the masonry work and that the ROICC representative agreed that Alliance could use the "low lift grout method," which involves lapping and splicing of vertical rebar (R4, tab 5).

17. Appellant has not identified the ROICC representative who allegedly agreed that it could use spliced vertical steel.

18. None of the individuals for whom appellant submitted declarations purport to have attended the meeting at which the ROICC representative agreed that appellant could use spliced vertical rebar (Priebe decl.; Griffith decl.; Montooth decl.; Stevenson decl.; Libby decl.). In addition, the record does not contain any contemporaneous

documentation substantiating appellant's assertion that a ROICC representative agreed that appellant could use lapped and spliced vertical rebar instead of full height vertical rebar.

19. Mr. Thomas O. Lenda, the Government's Project Engineer, and Mr. Rhone, the CR, deny entering into any agreement allowing appellant to use spliced vertical rebar (Lenda decl. at ¶ 9; Rhone decl. at ¶ 20).

20. On 13 May 1987, the Government directed appellant to install braces on Building #5 and to construct the remainder of the buildings with full height vertical rebar (R4, tab 7; Thomsen decl. at ¶¶ 32, 33, 34, 41, 42).

21. The contract was "usably" complete on 31 January 1991. Efforts to resolve this issue extended over several years. (R4, tab 21).

22. On 24 January 1996, appellant submitted a claim in the amount of $202,228 for installing braces on Building #5 and full height vertical rebar in the remaining six buildings (R4, tab 19).

23. The contracting officer denied the claim on 31 July 1996, stating that the drawings did not identify any locations where spliced vertical rebar was permitted, that appellant did not submit a prebid inquiry even though its masonry subcontractor was aware of a conflict between the specifications and the drawings prior to bidding, and that appellant's assertion that a Navy representative agreed to the use of spliced vertical rebar was unsubstantiated (R4, tab 21).

24. Appellant appealed the contracting officer's decision to this Board on 17 October 1996, where it was docketed as ASBCA No. 50288.

25. In support of its position, appellant offered the declaration of Mr. John C. Stevenson, a licensed architect and the principal of John C. Stevenson Architect, Inc. Mr. Stevenson concluded that appellant reasonably interpreted the contract to mean that full height vertical rebar was required only at the locations identified on the drawings for the following reasons:

> (a) The drawings were inconsistent with the specifications. "If . . . all the vertical [rebar] was to be unspliced, then there would not be any need to specify certain locations that expressly require an unspliced bar . . ." (¶ 27).
>
> (b) The drawings contained a number of indications that splicing was allowed. Drawings S-1 and S-2 set forth typical splicing details which

"definitely and clearly indicates that splices in the [rebar] are intended to be used." (¶ 33)

(c) The custom and practice in the industry is to use full height vertical rebar in multi-story buildings, not one-story buildings.

(d) The phrase "floor to floor or roof above" in paragraph 3.5 relates to a multi-story building (¶ 22).

(e) If only unspliced bars were intended, "there must be a requirement for a type of H-Block. Specification Section 04320 [sic] specifies certain types and shapes of masonry block . . . but nothing mentions . . . open end units (single open end) or H-Blocks (double open end), which are standard block shapes." (¶ 35)

(f) Specification section 04230, page 12, paragraph 3.5 was taken or copied directly from a Department of Navy guide specification.

(Stevenson decl.)

26. Appellant's other expert, Mr. Donald R. Libby, a registered civil and structural engineer and the principal of Libby Engineers, Inc., also concluded that appellant's interpretation was reasonable, citing the following reasons:

(a) A "reasonable contractor would interpret [the contract to mean] that 'FULL HEIGHT' vertical . . . bars were to be installed [only] at certain locations, e.g., at the door jambs." Otherwise, the notations on the drawings "would simply be redundant of what was already required." (¶¶ 33, 34)

(b) Based on the typical details and notes on drawings S-1 and S-2, "a reasonable . . . contractor [would be led] to believe that splicing of the [vertical bars] was allowed, except . . . where full height bars were expressly required." Otherwise, these typical details and notes are "wholly ignored and/or rendered essentially ineffective, i.e., they do not make sense together." (¶¶ 35, 39)

(c) Section 04230 of the specification was a Navy guide specification that had not been modified for this contract.

(d) The contract did not specify the correct type of block to be used with full height vertical rebar.

(Libby decl.)

27. Mr. Steen T. Thomsen, the A/E's structural engineering consultant, is a registered structural engineer. His declaration stated, in part, as follows:

> (a) "It is critically important in California that buildings meet or exceed seismic codes due to the high earthquake risk . . . ." As a result, we required that the walls of these buildings be reinforced with single piece vertical rebar. "Single piece vertical rebar was particularly important in Building No. 5, [because it] had twenty foot high masonry walls supporting a roof over . . . [a large interior] space." (¶¶ 7, 16)
>
> (b) Although often acceptable in single-story buildings, spliced vertical rebar is avoided in buildings with high masonry walls, such as Building #5, because it is not as strong as single piece vertical rebar (¶ 9).
>
> (c) Paragraphs 3.5 (requiring full height vertical rebar) and 3.5.2 (allowing splices "only as indicated") were put into the contract so that splices would only be used where they would not unacceptably weaken the structure of the building (¶¶ 13, 14).
>
> (d) Drawing S-12, the foundation plan for Building #5, calls out full height rebar in the masonry walls and full height jamb bars at the masonry openings (¶ 21).
>
> (e) During a site visit on 20 February 1987, I saw the masonry subcontractor installing spliced vertical rebar at Building #5. I called this to the Government's attention. Later that day, I attended a meeting with representatives of De Narde, Alliance and the Government. They all agreed that use of spliced vertical rebar violated paragraph 3.5. (¶¶ 25, 26, 27)
>
> (f) To reach a speedy resolution, I agreed to determine whether the spliced rebar installed at Building #5 could be accepted as a variance. My calculations showed that the walls were "unsafe unless braced." (¶ 32)
>
> (g) "It is my opinion as a licensed, professional structural engineer that one piece vertical rebar was required at Building No. 5 . . . ." (¶ 40)

(Thomsen decl.)

DECISION

Appellant argues that the rebar provisions of the contract were ambiguous for the following reasons. First, the drawings were inconsistent with paragraph 3.5 of section 04230 of the specifications because they contained notes requiring full height vertical rebar at specific locations, such as the door jambs. If full height vertical rebar was required in the masonry walls, appellant contends that these notes would have been unnecessary and redundant. Second, the drawings contained a number of references to splicing which, reasonably interpreted, indicated that splicing was acceptable. Third, paragraph 3.5 was written for a multi-story building rather than a one-story building. Fourth, the specification was a Navy guide specification. Fifth, the requirement for full height vertical rebar is inconsistent with the custom and practice in the industry for one-story buildings. And last, the contract did not specify the type of block that was compatible with full height vertical rebar.

It is well-established that a contractor seeking recovery based on its interpretation of an allegedly ambiguous contract must prove that it relied on its interpretation during preparation of the bid. *Fruin-Colnon Corporation v. United States*, 912 F.2d 1426 (Fed. Cir. 1990). Appellant has failed to make this showing. Although reliance is generally proven by producing the contractor's bid documents, appellant did not produce its bid documents. In his declaration, Mr. Priebe, the masonry subcontractor's estimator, stated that he prepared the masonry portion of appellant's bid and that he interpreted the drawings and specifications to mean that one piece vertical rebar was only required at the door jambs. Other evidence in the record indicates that both appellant and its masonry subcontractor understood that the contract required one piece vertical rebar in the masonry walls as well as at the door jambs at the time of bid preparation. Accordingly, appellant has failed to prove reliance.

Even if we were to find that appellant relied on its interpretation during bid preparation, it still cannot prevail because its interpretation is unreasonable. Appellant interprets the contract to mean that vertical rebar may be spliced at all locations except the door jambs, reasoning that the drawings only showed one piece rebar at the door jambs and that they contained a number of references to splicing, including a typical note which relates to splicing vertical rebar on drawing S-2. Appellant's interpretation completely ignores the order of precedence clause in the contract. FAR 52.236-21 SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 1984) provides that in the event of an inconsistency between the specifications and the drawings, the specifications govern. Thus, paragraph 3.5 took precedence over the drawings, including the typical splicing detail on drawing S-2.

Appellant's other arguments—that the Government's alleged use of a guide specification relieved it from providing full height vertical rebar, that the requirement for full height vertical rebar was inconsistent with the custom in the industry, that the specification related to multi-story buildings instead of one-story buildings, and that the

Government should have specified H-block if it intended that appellant use full height vertical rebar — are without merit. Since the requirement for full height vertical rebar was clear, the Government was entitled to masonry walls reinforced with full height vertical rebar, regardless of whether or not the Government used a guide specification as the basis for section 04230 of the specification or what the custom in the industry was with respect to single-story buildings. *Wright Construction Company Through Rembrant, Inc. v. United States*, 919 F.2d 1569, 1572-73 (Fed. Cir. 1990). Paragraph 3.5 required one piece vertical rebar "from floor to floor *or* roof" and therefore, encompassed both one story and multi-story buildings (emphasis added). Finally, appellant is incorrect in stating that the contract fails to specify a type of H-block. Note 1 of the Masonry Notes on Drawing S-1 states that "[a]ll units shall be open end units."

Appellant next argues that an unidentified Navy representative agreed that it could use spliced vertical rebar instead of full height vertical rebar at a meeting which took place on an undisclosed date. Unsubstantiated assertions such as this are insufficient to prove entitlement to an equitable adjustment. *Baganoff Engineering, Inc.*, ASBCA Nos. 46316, 46317, 95-2 BCA ¶ 27,612 at 137,623; *Techno Engineering & Construction, Ltd.*, ASBCA No. 32938, 88-1 BCA ¶ 20,351 at 102,913.

The appeal is denied.

Dated: 16 May 2000

ELIZABETH A. TUNKS
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
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. 50288, Appeal of De Narde Construction Company, rendered in conformance with the Board's Charter.

Dated:

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