ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Patriot Maintenance, Inc.	)	ASBCA No. 51756
	)	
Under Contract No. F65503-97-D-0001	)	

APPEARANCES FOR THE APPELLANT: Thomas G. Jeter, Esq.
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Denver, CO

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
MAJ Brian G. Koza, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

At issue in this appeal is appellant's claim for a refund of $56,296.00 it paid to painters pursuant to the Government's direction to pay Davis-Bacon Act wages. The parties have filed cross-motions for summary judgment. We grant the Government's motion and deny appellant's.

FINDINGS OF FACT

On 8 August 1996, the Air Force issued an Invitation for Bids (IFB) for military family housing maintenance, repair and renovation services at Eielson Air Force Base (AFB), Alaska. Both FAR 52.222-6 DAVIS-BACON ACT (FEB 1995), and FAR 52.222-41 SERVICE CONTRACT ACT OF 1965, AS AMENDED (MAY 1989), were incorporated by reference. (R4, tab 1)

On 30 September 1996, the Air Force issued Amendment No. 0002 to the IFB which provided answers to questions raised by potential bidders. Of relevance are questions 4, 12 and 20.

> 4. Question - Reference Attachment 5, Davis Bacon General Wage Decision AK960005. Which categories of Davis Bacon wages have historically been used for these services at

Eielson AFB? Specifically, is the offeror to use the "Painter" classification for painting over 200 square feet?

Answer - Historically Davis Bacon has not been utilized on Military Housing Maintenance contracts on Eielson. It has been determined that both the Davis Bacon and the Service Contract Act apply in this solicitation. Davis Bacon pertains to residential homes/real property. It applies to those services performed as stated in the Davis Bacon wage determination.

. . . .

12. Question - Is painting under this contract to be Service Contract Act or Davis Bacon? What is it under the existing contract?

Answer - Painting is under the Davis Bacon Act. Under the current contract it falls under the Service Contract Act. Davis Bacon was not used in the current contract.

. . . .

20. Question - Please identify the CLINs which fall under the Davis Bacon wage guidelines?

Answer - Any work that pertains to painters, carpenters, general laborers, plumbers and pipefitters.

(R4, tab 1)

Thereafter, the IFB was reviewed by the Chief of the Contract Processes Branch of the Contracting Division at Hickam AFB and comments forwarded to Eielson AFB in a memorandum dated 15 October 1996. Item 15 of the memorandum commented that there was a "[n]eed to clarify answer to question 12 on Amendment 0002 using the guidelines set forth in DFARS 222.402-70." (Supp. R4, tab 18)

On 21 October 1996, the Air Force issued Amendment No. 0003, which, under Section J, stated: "Clarification of question number 12 on Amendment 0002 - DFARS 222.402-70 explains in detail the guidelines that should be utilized in determining when to apply Davis-Bacon and Service Contract Act wage rates" (R4, tab 15).

DFARS 222.402-70 provides in relevant part:

> (a) Apply both the Service Contract Act (SCA) and the Davis-Bacon Act (BDA) to installation support contracts if --
>
> (1) The contract is principally for services but also requires a substantial and segregable amount of construction, alteration, renovation, painting, or repair work;
>
> . . . .
>
> (b) SCA coverage under the contract. Contract installation support requirements, such as plant operation and installation services (i.e., custodial, snow removal, etc.) are subject to the SCA. . . .
>
> (c) DBA coverage under the contract. Contract construction, alteration, renovation, painting, and repair requirements (i.e., roof shingling, building structural repair, paving repairs, etc.) are subject to DBA. . . .
>
> (d) Repairs versus maintenance. Some contract work may be characterized as either DBA painting/repairs or SCA maintenance. . . . In those instances where . . . it is unclear whether the work required is SCA maintenance or DBA painting/repairs, apply the following rules --
>
> . . . .
>
> (3) Painting work of 200 square feet or more to be performed under an individual service call or order shall be considered to be subject to the DBA regardless of the total work-hours required.
>
> (e) The determination of labor standards application shall be made at the time the solicitation is prepared in those cases where requirements can be identified. . . .

Appellant's president, Mr. Stephen Tate, reviewed the guidelines set forth in DFARS 222.402-70 and determined that the painting was not covered by the Davis-Bacon Act. His determination was based upon his belief that the contract did

not require a "substantial and segregable" amount of painting because it was to be performed as part of the change of occupancy (COM) work. (Tate Decl. at ¶¶ 5, 6) In reaching this conclusion, he also relied upon prior military family housing maintenance contracts appellant had performed at Vandenberg, Bolling, Grissom and Offut AFBs where painting work was covered by the Service Contract Act (*id.* at ¶ 7).

Additionally, Mr. Tate relied upon appellant's experience in a bid protest (*Ameriko, Inc.*, B-266034.2, 96-1 CPD ¶ 176) earlier that year in which the Comptroller General, in upholding the award, found that painting work under a contract for military family housing maintenance services at Offut AFB had been properly classified as subject to the Service Contract Act (*id.* at ¶ 8). Having concluded that the painters should be paid Service Contract Act wages, Mr. Tate computed appellant's bid on that basis (*id*. at ¶ 9).

Mr. Tate's interpretation was in conflict with the contract requirement to pay Davis-Bacon Act wages to painters explained in Amendment No. 0002. Appellant did not inquire about the issue.

Contract No. F65503-97-D-0001 was awarded to appellant on 16 December 1996 in the amount of $1,974,293. The contract provided for a base year and four options. From the first day of contract performance, appellant paid its painters the wage rates prescribed by the Service Contract Act.

On 18 February 1998, the contracting officer advised appellant that its painters should be paid Davis-Bacon Act wage rates (R4, tab 1). Thereafter, the parties exchanged correspondence in which the Government asserted that the Davis-Bacon Act wage rates were applicable to appellant's painters and appellant insisted that, under DFARS 222.402-70, the Service Contract Act wage rates were applicable (R4, tabs 2 through 5, 8 through 13).

By a letter dated 29 June 1998, the contracting officer directed appellant to make Davis-Bacon Act back-pay restitution to its painters and to produce proof thereof by 20 July 1998, or have 10 percent retainage imposed upon future invoices (R4, tab 12). Appellant complied and, on 15 July 1988, provided evidence of its payments (R4, tab 13).

On 27 July 1988 appellant submitted a claim to the contracting officer seeking an equitable adjustment to the contract price in the amount of $56,296.00 for the additional costs it had incurred in complying with the contracting officer's direction to pay its painters Davis-Bacon Act wages (R4, tab 14). The claim was denied in a final decision dated 24 August 1998 (R4, tab 16). This timely appeal followed.

DISCUSSION

The issue in this appeal is whether appellant was required to pay its painters wages under the Davis-Bacon Act or the Service Contract Act. Both parties have moved for summary judgment. While this does not mean that we must enter judgment as a matter of law for one side or the other, *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987), the issue raised is one of contract interpretation which, in this case, is amenable to summary disposition. *See Fortec Constructors v. United States*, 760 F.2d 1288, 1291 (Fed. Cir. 1985).

Appellant asserts entitlement to a contract price adjustment representing the additional Davis-Bacon Act wages it paid to its painters at the direction of the contracting officer. It contends that the IFB was ambiguous as to the applicable wage rate and that, instead of clarifying the issue, Amendment No. 0003 simply directed bidders to DFARS 222.402-70. It asserts that its application of those guidelines was reasonable given the decision in *Ameriko, Inc., supra*, and its experience with four previous Air Force contracts for military family housing maintenance. It further argues that the Government is estopped from imposing Davis-Bacon Act wages and is otherwise barred from doing so because it failed to raise a timely objection to appellant's interpretation of the contract.

The Government contends that appellant's interpretation is unreasonable because it is based upon the erroneous proposition that appellant was contractually permitted to choose to pay wages under either the Davis-Bacon Act or the Service Contract Act. It asserts that the only reasonable interpretation to be drawn from a harmonized reading of the contract provisions, as explained by Amendment Nos. 0002 and 0003, is that Davis-Bacon Act wages were to be paid to painters. The Government further contends that appellant's interpretation of Amendment No. 0003 creates a patent ambiguity and that it failed to seek further clarification as it was legally obligated to do.

We agree with the Government. The RFP for this contract to perform military family housing maintenance, repair and renovation services at Eielson AFB incorporated both the Davis-Bacon Act and the Service Contract Act and potential bidders asked a number of questions about application of the Davis-Bacon Act. These questions were answered in Amendment No. 0002 to the IFB. The answer to question 4 explained that, although not historically used for military housing maintenance contracts at Eielson AFB, the Government had determined that both the Davis-Bacon Act and the Service Contract Act applied to this solicitation and that Davis-Bacon pertained "to residential homes/real property." The answer to question 12 plainly stated: "Painting is under the Davis[-]Bacon Act." The answer to question 20 likewise plainly stated that "[a]ny work pertain[ing] to painters . . ." was covered by the Davis-Bacon wage guidelines.

Although the answer to question 12 seems absolutely clear, the Government determined that the answer should be further clarified by explaining that DFARS 222.402-70 contained the guidelines that were to be used when determining when

to apply Davis-Bacon and Service Contract Act. Thus, to the extent the IFB was ambiguous about the wages to be paid to painters, the ambiguity was clarified by Amendment Nos. 0002 and 0003: painters were to be paid Davis-Bacon Act wages.

The determination of which labor standards were to apply to the Eielson contract had been made at the time of the solicitation. *See* DFARS 222.402-70(e). It is irrelevant, therefore, that appellant had been involved in a bid protest in which the Comptroller General concluded painters were subject to the Service Contract Act and that appellant had performed other Air Force contracts in which painters were also subject to the Service Contract Act. The answers to questions 4, 12 and 20 provided in Amendment No. 0002 specifically informed bidders that, notwithstanding the fact that painters had been subject to the Service Contract Act on the previous and current military family housing maintenance contracts at Eielson AFB, painters on this contract would be subject to the Davis-Bacon Act. The reference to DFARS 222.402-70 in Amendment No. 0003 explained the basis for the Government's determination that Davis-Bacon wages were to be paid.

To the extent the reference to DFARS 222.402-70 in Amendment No. 0003 may have created a further ambiguity, the ambiguity was patent. Amendment No. 0002 made clear that painters were to be paid Davis-Bacon Act wages. After reading DFARS 222.402-70, Mr. Tate reached a contrary conclusion; *i.e.*, that painters were to be paid Service Contract Act wages. Instead of inquiring about the patent conflict created by his interpretation of DFARS 222.402-70, he relied upon his interpretation in computing appellant's bid and then paid appellant's painters wages proscribed by the Service Contract Act until the contracting officer directed appellant to make Davis-Bacon Act back-pay restitution. On these facts, we are satisfied that appellant should bear the risk of its failure to inquire. *See Newsom v. United States*, 676 F.2d 647 (Ct. Cl. 1982).

Nor can appellant prevail upon its estoppel theory. The elements of estoppel are set forth *American Electric Laboratories, Inc. v. United States*, 774 F.2d 1110, 1113 (Fed. Cir. 1985). As to the first two elements (the Government knew the facts and intended its conduct be acted on or its conduct was such that appellant reasonably believed that it was so intended), the record leaves no doubt that the Government intended that painters were to be paid Davis-Bacon Act wages. As to the third element (appellant was ignorant of the true facts), appellant's failure to know that Davis-Bacon Act wages were applicable is attributable to its interpretation of DFARS 222.402-70. Appellant also cannot satisfy the last element (detrimental reliance on the Government's conduct) inasmuch as it relied upon its own interpretation.

Appellant's final contention, that the Government is barred from imposing Davis-Bacon wage rates because it did not enforce the Davis-Bacon Act requirements for the first 14 months of performance, is likewise without merit. We have found that the

contract unambiguously required appellant to pay Davis-Bacon Act wages to its painters. Accordingly, the cases upon which appellant relies for the proposition that a party must timely raise objections to another party's interpretation or be barred from asserting a contrary one are inapposite. The same is true of the authority it has cited as support for its contention that the Government is barred from retroactive changes to the contract requirements.

CONCLUSION

The appeal is denied.

Dated: 6 September 2000

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

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. 51756, Appeal of Patriot Maintenance, Inc., rendered in conformance with the Board's Charter.

Dated:

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