ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Overstreet Electric Co., Inc.	)	ASBCA No. 52401
	)	
Under Contract No. N62467-98-C-3128	)	

APPEARANCE FOR THE APPELLANT: Mr. Benjamin J. Overstreet
President

APPEARANCES FOR THE GOVERNMENT: Arthur H. Hildebrandt, Esq.
Navy Chief Trial Attorney
Audrey Van Dyke, Esq.
Associate Counsel (Litigation)
Naval Facilities Engineering Command
Washington, DC

OPINION BY ADMINISTRATIVE JUDGE FREEMAN
UNDER RULES 11 AND 12.3

Overstreet Electric Co., Inc. (Overstreet) appeals the denial of its claims for a time extension, Eichleay damages, and amounts allegedly due for an approved value engineering change proposal (VECP). Both parties have submitted the appeal for decision under Rule 11 without oral hearing. Overstreet has elected the Rule 12.3 accelerated procedure. Although Overstreet contends in its reply brief that the proceedings were limited to "merit" and did not include amount, no order to that effect was issued by the Board (app. reply br. at 2). Absent such order, we decide both legal entitlement and amount, and find Overstreet entitled to recover $5,483.35 with no time extension.

FINDINGS OF FACT

1. Contract No. N62467-98-C-3128 was awarded to Overstreet pursuant to formal advertising on 14 September 1998. The contract required replacement of a rotating beacon at a naval air station for a firm fixed price of $139,500. The specified completion date was 28 December 1998. (R4, tab 1 at 22) The contract included, among other provisions, the FAR 52.236-5 MATERIAL AND WORKMANSHIP (APR 1984) clause, and

the FAR 52.248-3 VALUE ENGINEERING – CONSTRUCTION (MAR 1989) - ALTERNATE I (APR 1984) clause (R4, tab 1 at 77, 79).

2. The contract specifications, including military specification MIL-L-7158(E) and the military standards referenced therein, called for a 24-inch duplex beacon with alternating green and double peak white beams, 1,200 watt incandescent lamps producing 27,500 lumens each, a clutch/gear drive system capable of speeds up to 24 rpm, and an automatic lamp changer. Lumens measure the intensity of light. The intensity of the light is the most essential feature of the beacon enabling pilots to locate the airfield in inclement weather. (R4, tab 1, § 16522 at 1, 3; app. supp. R4, tab C-9, ¶¶ 2.1, 3.5, 3.8, 3.9.3, 3.10.1; ex. G-3 at 1-2 and Attachments 2, 3)

3. The specifications required Overstreet to submit for Government approval the manufacturer's catalog data on the specific beacon that it intended to procure (R4, tab 1, § 16522, ¶ 1.3.1). The specifications allowed the Government 30 working days for review of the submittal (R4, tab 1, § 01330, ¶ 1.3.3). Overstreet made two submittals on the beacon. Neither submittal met the contract specifications. The first submittal, on 7 October 1998, proposed a quadraplex beacon that did not provide a double peak white beam. (R4, tabs 4, 5) The second submittal, on 5 November 1998, proposed an 8-inch duplex beacon with 175 watt metal halide lamps producing only 7,800 lumens each, a 6 rpm belt drive system and no automatic lamp changer (R4, tab 8; ex. G-3 at 1-2). Both submittals were disapproved by the Government within the specified time limit for review on 23 October and 18 November 1998 respectively (R4, tabs 5, 8).

4. Overstreet responded to the disapproval of its first submittal with a claim that the contract specifications required a proprietary sole-source beacon and that its proposed beacon should be approved as a substantial equal (R4, tab 6). The contracting officer replied with a direction to proceed with installation of the specified "double-peak white beam" beacon (R4, tab 7). The double peak white beam identified the airfield as a military airfield (R4, tab 5). On 22 December 1998, Overstreet placed a purchase order with a vendor for a beacon meeting MIL-L-7158 "in its entirety." The accepted purchase order price was $20,500. The quoted delivery was 16 to 20 weeks. (Overstreet Affidavit, dated 16 March 2000, with attached Graybar letter and Overstreet purchase order)

5. On 3 January 1999, Overstreet proposed the previously submitted 175 watt metal halide lamp beacon, or alternatively a 250 watt metal halide lamp beacon, as a VECP. The contracting officer rejected this proposal on 11 January 1999 because "the product impairs essential functions." The contracting officer further stated that the Government would consider a VECP for a "refurbished" MIL-L-7158 beacon. (R4, tabs 16, 19) On 12 January 1999, Overstreet submitted a VECP for a refurbished MIL-L-7158(E) meeting all functional requirements of that specification except that it had 250 watt metal halide lamps which produced only 21,500 lumens each (R4, tab 20).

6. By FAX message sent on 15 January 1999, the contracting officer accepted the VECP for the refurbished beacon subject to (i) use of 400 watt lamps; (ii) a credit to the Government of not less than $5,175 for instant contract savings; and (iii) "no time is associated with this change" (R4, tabs 22, 26). On receipt of this FAX, Overstreet canceled the order for the new MIL-L-7158(E) beacon, ordered a refurbished beacon with 400 watt metal halide lamps, and notified the contracting officer that it was proceeding as authorized by the FAX. Overstreet did not object at this time to any of the conditions in the FAX. (R4, tab 24)

7. On 8 February 1999, the Government proposed a contract modification reducing the contract price by $10,459.35 for the Government's 45 percent share of its estimated instant contract savings of $23,243 for the approved VECP. The Government computed the instant contract savings as the difference between what it alleged to be the "market value" of the specified new MIL-L-7158(E) beacon ($32,243) and the cost of the refurbished 400 watt beacon ($9,000). (R4, tab 30) When Overstreet refused to agree to this modification, the Government deducted its share of the claimed savings from a contract payment due Overstreet (R4, tab 38).

8. On 4 March 1999, the contracting officer received a claim from Overstreet for a 70-day time extension and payment of $11,420.44. The 70-day time extension was for the period from the specified completion date of 28 December 1998 through 8 March 1999. Overstreet alleged that completion of the contract was delayed for this period by the delay in procuring the beacon. (R4, tabs 32, 33) Corrected for arithmetic errors, the total monetary claim was $11,442.04 and consisted of the following items: (i) excessive deduction of instant contract savings by the Government: $5,284.35; (ii) contractor's 20 percent share of one-year collateral savings: $2,617.28; (iii) consulting fees with overhead and profit: $1,316; (iv) unabsorbed home office overhead for 70 days of delay: $2,111.34; and (v) one percent bond on other claim items: $113.07 (R4, tab 32 at 20-21). Overstreet's claim was denied in all respects by the contracting officer's final decision dated 20 August 1999 (R4, tab 40). This appeal followed.

9. With respect to the time extension claim, the Government did not at any time during performance of the contract indicate that it was waiving the original contract completion date of 28 December 1998. By letter dated 21 December 1998, the contracting officer told Overstreet that failure to complete on time would result in the assessment of liquidated damages. (R4, tab 13) When Overstreet failed to complete the work on 28 December 1998, the contracting officer issued a "cure" notice, and stated "we are not aware of any justification for an extension of time" (R4, tab 15). Overstreet replied to the cure notice on 6 January 1999 alleging that the contract was impossible to perform in the specified 90 days, and enclosed a schedule projecting completion on 30 May 1999 (R4, tab 18). By letter dated 21 January 1999, the contracting officer

rejected the claim of impossibility and told Overstreet that its estimated completion date of 30 May 1999 was unacceptable (R4 tab 25).

10. With respect to the instant contract savings, Overstreet has proven that it had a confirmed purchase order for the specified MIL-L-7158(E) beacon in December 1998 for $20,500. *See* Finding 4 above. Although the Government in its post-hearing brief states that there is no proof of the $9,000 cost claimed by Overstreet for the refurbished beacon, the Government used that amount in calculating and deducting its own claimed share of the instant contract savings. *See* Finding 7 above. We find the $9,000 cost substantially undisputed. Accordingly, the proven instant contract savings were $11,500 ($20,500 - $9,000), of which the Government's share (45 percent) was $5,175 and not the $10,459.35 which it deducted from the contract payment due Overstreet.

11. The contracting officer's final decision allowed nothing for collateral savings on the ground that an award of collateral savings was at the contracting officer's sole discretion (R4, tab 40 at 2). ALTERNATE I of the VALUE ENGINEERING - CONSTRUCTION clause provides for the deletion of paragraph (g), the collateral savings provision, from the basic clause "[w]hen the head of the contracting activity determines that the cost of calculating and tracking collateral savings will exceed the benefits to be derived in a construction contract." FAR 48.202 states that when the VALUE ENGINEERING - CONSTRUCTION clause is inserted in construction solicitations and contracts, the contracting officer "shall" use the clause with ALTERNATE I "[i]f the head of the contracting activity determines that the cost of computing and tracking collateral savings for a contract will exceed the benefits to be derived." (Emphasis added) Both affidavits submitted by the head of the contracting activity state that he made the determination required by ALTERNATE I and FAR 48.202 after award of the contract at the time the VECP for the refurbished beacon was under consideration. (Exs. G-1 at 2-3, -2)

12. Overstreet computed a one-year collateral savings of $13,088.64 in its claim (R4, tab 24 at 2, tab 32 at 20). In the proceedings on appeal, the contracting officer computed a maximum one-year collateral savings of $994 (ex. G-1 at 5). The difference between these two calculations is due to differences in their respective estimates of the annual operating hours for the beacon, and the material and labor costs for lamp replacement. Overstreet assumed that the beacon would be operated 24 hours per day, seven days per week. (R4, tab 24 at 2, tab 32 at 20) The contracting officer estimated beacon operating time at seven hours per day, five days per week based on his personal discussions with the airfield Air Operations Officer (ex. G-1 at 3-5). For the data on the lamp replacement labor and material cost, the contracting officer relied on the report of the contractor responsible for maintaining the existing beacon (ex. G-1 at 4). There is no evidence that the contracting officer's determination was unreasonable, arbitrary,

capricious or otherwise an abuse of discretion. Overstreet's 20 percent share of the $994 maximum one year collateral savings determined by the contracting officer is $199.

13. Overstreet's claim item for "[c]onsulting fees paid in an attempt to reach an equitable and/or correct decision" is not supported by any invoices describing the services performed or for what "decision" they were performed. The allocability of the claimed costs to either the development or implementation of the approved VECP is not proven. Overstreet's claim item for "unabsorbed home office overhead" is based on contract billings of $25,397 for a 142-day contract performance period, total company billings of $2,073,165 for the same period, and a home office overhead of $317,833 for that period. (R4, tab 32 at 24) There are no financial statements or other business records in evidence supporting these figures, or showing that the home office overhead amount consisted only of fixed and no variable costs. There is also no evidence that any additional bond expense was incurred for the development or implementation of the approved VECP.

DECISION

A. The 70-Day Time Extension Claim

Overstreet's claimed time extension for the delay in procuring the beacon is without merit. It may be that the specified 90-day contract performance period did not allow sufficient time for procurement of a new MIL-L-7158(E) beacon. *See* Finding 4 above. The Government, however, does not warrant the timely availability of specified materials which are to be procured by the contractor. *See WRB Corporation v. United States*, 183 Ct. Cl. 409, 511-12 (1968); *Franklin E. Penny Co. v. United States*, 524 F.2d 668, 674-75 (Ct. Cl. 1975). Overstreet was responsible for procuring the beacon, and it could have determined its availability before it bid. Moreover, Overstreet did not attempt to procure the specified beacon until six days before the contract completion date. *See* Finding 4 above. Overstreet wasted the preceding 84 days of the 90 days specified for performance in attempting to get the Government to approve beacons which patently did not comply with the specifications. The Government did not exceed the specified time limits for reviewing and rejecting those submittals. *See* Finding 3 above.

Overstreet argues that MIL-L-7158(E) was in effect a specification by trade name or make, and that under paragraph (a) of the MATERIAL AND WORKMANSHIP clause, its second proposed beacon should have been approved as "equal" to the specified beacon. We disagree. Assuming *arguendo* that the specification was in effect a trade name or make specification, the second proposed beacon, among other things, did not meet by substantial margins the specified size and intensity (lumens) requirements. *See* Finding 3 above. Considering that the purpose of the beacon was to guide pilots to the airfield at

night and in low visibility conditions, those requirements were self-evidently "salient" characteristics of the specified beacon, and required no express identification as such in the specifications.

The Government was also not responsible for the delays incident to Overstreet's submission of the VECP's, or the delay in procuring the beacon approved on the second VECP. The submission of a VECP does not suspend contract performance pending a decision on the proposal. Paragraphs (e)(1) and (3) of the VECP clause state in relevant part: "The Government will process VECP's expeditiously; however, it shall not be liable for any delay in acting upon a VECP. . . . Until a notice to proceed is issued or a contract modification applies a VECP to this contract, the Contractor shall perform in accordance with the existing contract." When the second VECP was approved for the 400 watt beacon, an express condition of the approval was "no time is associated with this change." In proceeding with the 400 watt beacon on notice of this condition and without objection, Overstreet bound itself to the specified conditions. *See* Finding 6 above.

B. The Monetary Claim

The first item of Overstreet's monetary claim is for the Government's erroneous calculation of the instant contract savings for the approved VECP. We agree with Overstreet's calculation. Overstreet has proven that it would have incurred only $20,500 for a new MIL-L-7158(E) beacon, and the cost of the refurbished beacon is not substantially disputed. *See* Findings 4, 7 and 10 above. Overstreet is entitled to recover the $5,284.35 difference between its calculation of the instant contract savings and the amount withheld by the Government.

The second item of Overstreet's monetary claim is $2,617.28 for its 20 percent share of the alleged first year collateral savings for the approved VECP. The Government denies any collateral savings are due. It contends that, pursuant to ALTERNATE I of the VALUE ENGINEERING - CONSTRUCTION clause, the paragraph (g) collateral savings provision of that clause was deleted when the head of the contracting activity determined, after award when the second VECP was submitted, that the cost of calculating and tracking collateral savings would exceed the benefits to be derived. We consider this post-award determination to be ineffective in deleting the collateral savings provision from the clause. The regulation prescribing use of ALTERNATE I provides for the required determination to be made "for the contract," and not for individual VECP's, and that it be made when the contracting officer issues the solicitation. FAR 48.202.

Paragraph (g) provides that the contracting officer shall be "the sole determiner" of the amount of collateral savings, and purports to exclude review of that determination from our jurisdiction under the Contract Disputes Act of 1978. Such provisions in

contract clauses or regulations are ineffective in excluding our statutory jurisdiction, but they do allow the decision-maker a discretion reviewable only for "abuse." *Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d 854, 859-60 (Fed. Cir. 1997). In this case, the contracting officer's determination of the collateral savings was substantially less than Overstreet's calculation, but it had a rational basis and we have found no abuse of discretion. Pursuant to paragraph (g), Overstreet is entitled to $199 as its 20 percent share of the one-year collateral savings. *See* Finding 12 above.

Since the Government was not responsible for the delay in performance, Overstreet's Eichleay claim fails for lack of entitlement, in addition to not being proven in amount. While the costs of developing and implementing an approved VECP are deductible from the instant contract savings, Overstreet's brief description of the claimed consulting services is insufficient to conclude that they were incurred for that purpose. Finally, the claim for additional bond expense fails for lack of proof that any additional bond expense was incurred for development or implementation of the approved VECP. *See* Finding 13 above.

The appeal is sustained in the amount of $5,284.35 for the excessive Government deduction of its share of the instant contract savings, and in the amount of $199 for the contractor's share of the collateral savings. Interest pursuant to 41 U.S.C. § 611 will run on these amounts from 4 March 1999. The appeal is in all other respects denied.

Dated: 15 June 2000

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

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. 52401, Appeal of Overstreet Electric Co., Inc., rendered in conformance with the Board's Charter.

Dated:

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

_____
Front Office

ARMED SERVICES BOARD OF CONTRACT APPEALS
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CONCURRENCES IN DRAFT DECISION

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LST spell checked	Date	Author/Judge Reviewed
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Appeal of --	)	
	)	
Overstreet Electric Co., inc.	)	ASBCA No. 52401
	)	Rule 12.3
Under Contract No. N62467-98-C-3128	)	

The first undersigned hereby tenders the attached draft decision in the above-referenced appeal for action by a Vice Chairman and Chairman.

_____	_____
Member	Date
I _____ _____	_____
Vice Chairman	Date
I _____ _____	_____
Acting Chairman	Date