ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Catel, Inc.	)	ASBCA No. 52224
	)	
Under Contract No. DACA51-98-C-0061	)	

APPEARANCE FOR THE APPELLANT: Robert T. Lawless, Esq.
Hedinger & Lawless
Florham Park, NJ

APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.
Engineer Chief Trial Attorney
Lorraine Lee, Esq.
District Counsel
Donald M. Harris, Esq.
Carolyn A. Lynch, Esq.
James G. Palmer, Esq.
Trial Attorneys
U.S. Army Engineer District, New York

OPINION BY ADMINISTRATIVE JUDGE DICUS

This appeal is taken from a deemed denial of Catel, Inc.'s (Catel's) claim for additional costs of $75,857.56. The underlying contract was awarded by the United States Army Corps of Engineers (respondent) for maintenance enhancement to base drainage at McGuire Air Force Base, New Jersey (McGuire). We deny the appeal.

FINDINGS OF FACT

1. A solicitation was issued by respondent to Catel on a sole source, negotiated basis. Catel is an experienced excavation firm with experience in Government contracting that is qualified under the Small Business Administration's 8(a) program, and the solicitation and resultant contract were under that program. (Tr. 9-10, 127-28) Catel responded to the solicitation with proposals dated 4 September 1998 ($499,636) and 9 September 1998 ($313,887) (R4, tabs C, D). Catel's president, Telmo Pires, had been told that the Government budget for the work was in the "mid 200s" and might be raised to the "high 200s" (tr. 16). He understood the work to include "[c]orrecting all ditch work . . . [taking] all erosions that had to be corrected and make them properly tapered back, which means that in some cases you have to fill in ditches, in other cases you had to cut the ditches." (Tr. 11-12)

2. The 9 September 1998 proposal included a cost breakdown which did not list the cost of new piping or headwalls. The following relevant items were priced as follows:

	Quantity		Unit	Total
clear and grub site area		ls	$6,000.00	$6,000
. . . .				
site excavation work (trench regrading)	148,100	sf	0.40	58,440
. . . .				
soil retention mat	85,855	sf	0.40	34,342

(R4, tab E)

3. Telephonic negotiations between the parties commenced on 24 September 1998. Catel was represented by Mr. Pires. The Government was represented by Martin McRimmon, among others. (Tr. 131) During the negotiations certain elements of the work were discussed and respondent attempted to negotiate a price reduction (tr. 135-36). It was also determined that both the Government estimate and Catel's proposals did not include certain required work elements. The Government estimate did not include dewatering, clearing and grubbing, and silt fence. Erosion control matting was underestimated. Catel' s proposal did not include certain pipes and headwalls. Catel did not dispute the requirement for the pipes and headwalls. The Government estimate was revised with $20,000 for dewatering, and $5,312 for clearing and grubbing added. Silt fence was increased by $510 and erosion control matting was increased by $27,600. The Government estimate was raised from $236,000 to $305,900, which was documented in a 28 September 1998 memorandum. (R4, tabs E, J; tr. 19-20) An agreement was not reached (tr. 21-22). A proposal dated 25 September 1998 in the amount of $308,973 was thereafter faxed to respondent (R4, tab F; tr. 17).

4. A later telephone discussion took place between Mr. Pires and Mr. McRimmon during which there was no specific discussion of deletions (tr. 22). According to Mr. Pires, he individually reworked his proposal to include the omitted items at a cost of approximately $45,000 and deleted or reduced other items in order to bring his overall price down. He testified that he deleted clearing and grubbing, and erosion matting, while reducing excavation work. The associated cost reductions were $6,000 for clearing and grubbing, $34,342 for erosion matting, and approximately $17,000 for excavation. (Tr. 23-24, 34) The net result was an overall price reduction of roughly $12,000 to $302,000. He informed Mr. McRimmon that he could get the price down to $302,000 or $301,000 and Mr. McRimmon told him to put it in writing (tr. 35-36). Mr. Pires testified that the contract specifications required clearing, grubbing, soil erosion matting and any necessary graded area excavation (tr. 24, 61, 62-64). He also testified that Catel intended to perform graded area excavation in a way that would not comply with contract specifications (tr. 24).

5. According to Mr. McRimmon, there was discussion about price reductions, but no discussion of deleting or eliminating items during either the 24 September 1998 negotiation session or his later discussions with Mr. Pires (tr. 134, 144-45). During negotiations Mr. Pires was told there could be no deletions and Catel's offer should be based on the solicitation requirements (tr. 135). He believed that Catel was merely reducing its price (tr. 166). The record contains no basis for the Board to find that respondent would have agreed to deletion of the items, or to a higher price for performance of the contract specifications as written.

6. On 25 September 1998 Catel submitted an executed SF 1442 titled "Final Proposal Revision" in which Catel lowered its price to $302,000. The offer included an Addendum No. 1 which proposed to leave soil removed from ditches onsite. (R4, tab K) Two letters from Catel were received by respondent on 28 September 1998. The first, Catel's final proposal, stated in relevant part:

> As per your request, we are forwarding the following information:
>
> | | |
> |---|---|
> | Our Original Proposal | $313,887.00 |
> | Our Final Proposal | $302,000.00 |
>
> After negotiations, Catel, Inc. adjusted their offer based on the following:
>
> | REDUCTION TO DEPT. OF THE ARMY: | ADDITIONAL TO CATEL: Replace Storm Drainage System |
> |---|---|
> | Clear/Grub Site Area | Piping |
> | Graded Area Excavation | Headwalls |
> | Soil Retention Mat | |
>
> TOTAL LEAVES DEPT. OF THE ARMY WITH A CREDIT ADJUSTMENT OF: $11,887.00

(R4, tab H)

7. Later on 28 September 1998 Catel transmitted a second letter, as follows:

> Please delete Addendum # 1 which states "all fill/soil removed from ditch areas to remain on and be relocated within project site" from our proposal. We will follow the specifications as written.

(R4, tab I) The last sentence was intended by Catel to be applicable only to the deletion of the addendum (tr. 39, 72). The deletion of the addendum was expressly included in the contract (R4, tab B).

8. A post-negotiation memorandum was prepared on or about 28 September 1998. The memorandum stated, *inter alia*:

> An opening statement by the Government explained that quantity and price differences would be discussed in an attempt to reach an agreeable fair and reasonable price. During negotiations we discussed items in the contractor's proposal with the largest disparity to the I.G.E [sic] [independent Government estimate], namely site excavation (contractor accounted for a greater amount of top soil for graded areas totaling more acres than that of the IGE). The government also felt that the contractor overestimated his unit cost for the amount of graded area, approximately four times the amount of the IGE. The contractor explained that the increase in this cost was due to work performed during the winter months attributing to wet terrain. Other topics of interest were the amount of clearing and grubbing involved in comparison to the IGE (contractor explained trenches in certain areas under bridges). The Government expressed concern regarding the contractor' s total price for "Erosion and Sedimentation". The contractor explained that this total included a price for a "Soil Retention Mat" which the Government failed to include in the IGE. Upon further investigation with the installation, it was confirmed that this was a part of the specification and shall be made an additional item in the IGE. An issue arose as to whether the seeding placed during the months of December would survive once the soil retention mat was placed, and whether or not there would be a need for the contractor to return to the site at spring time to repeat the seeding process.
>
> . . . .
>
> The contractor was able to revise his proposal based on items reviewed during negotiations. The contractor found that their prices on certain items were too high in comparison with the original IGE. It was determined that the contractor's proposal actually had quantity measurements and unit costs which were unrealistic in light of the actual scope of work. It was found that the contractor included a much greater amount of clearing

> and grubing than was actually needed, resulting in a substantial deduction in price (approximately half of his original cost). The contractor agreed to the 3.4 acres of graded area estimated by the Government and reduced his unit cost considerably for this item from $.40 to $.20. This unit cost for soil erosion and sedimentation was also decreased to $.20 from $.40. A cost of approximately $25,000.00 was added to the contractor'ss [sic] original proposal for replacement of piping. Despite this increase the contractor's final proposal remains below the revised IGE.
>
> . . . .
>
> Based on the above findings, it is in the best interest of the Government to award this project at the contractor's final proposed amount of $302,000.00

(R4, tab J)

9. After submission of the 28 September 1998 letters Mr. Pires testified that Catel believed it had proposed to perform the contract at a price of $302,000 with clearing and grubbing and erosion control matting eliminated from the scope of work, and with excavation requirements reduced (tr. 36-37). However, Mr. Pires' testimony as to how the work could be performed with the alleged deletions and reductions (tr. 24-26, 64) is unpersuasive. Respondent believed that nothing had been deleted from the scope of work and that Catel had merely reduced its price (tr. 144-45, 161-62, 166).

10. Contract No. DACA51-98-C-0061 was awarded to appellant on 30 September 1998. Pursuant to Standard Form 1442, Item 29, the contract contained Catel's offer. Relevant contract clauses included FAR 52.233-1 DISPUTES (OCT 1995)--ALTERNATE I (DEC 1991) and FAR 52.243-4 CHANGES (AUG 1987). (R4, tab B)

11. The contract specifications included various provisions regarding clearing and grubbing and excavation such as the following:

> Section 02210 GRADING
>
> . . . .
>
> Part 3 EXECUTION
>
> 3.1 CONSERVATION OF TOPSOIL

> Topsoil shall be removed 6 inches . . . .
>
> 3.2 EXCAVATION
>
> Excavation of every description, regardless of material encountered, within the grading limits of the project shall be performed to the lines and grades indicated . . . .
>
> 3.3 EXCAVATION OF DITCHES
>
> Ditches shall be cut accurately to the cross sections and grades indicated. . . .
>
> . . . .
>
> 3.6 PREPARATION OF GROUND SURFACE FOR FILL
>
> All vegetation, such as roots, brush, heavy sods, heavy growth of grass, and all . . . unsuitable material within the area upon which fill is to be placed, shall be stripped or otherwise removed before fill is started. . . .
>
> . . . .
>
> 3.9 PLACING TOPSOIL
>
> . . . .
>
> 3.9.1 Clearing
>
> Prior to placing topsoil, vegetation shall be removed from the area and the ground surface cleared of all other materials that would hinder proper grading, tillage or subsequent maintenance operations.

(R4, tab B)

12. The contract drawings established profiles and depths for excavation of all ditches as well as instructions for grading (R4, tab B).

13. Section 02935, TURF, subparagraph 3.4.1, Erosion Control Blanket, required placement of soil erosion control blanket on newly seeded areas (R4, tab B).

14. Notice to proceed was issued 24 November 1998 (R4, tab L). On 6 January 1999 a meeting was held at which Catel informed the Government that, pursuant to Catel's 28 September 1998 proposal letter (finding 5), it considered contract requirements for clearing and grubbing, graded area excavation, and soil retention matting to have been deleted. Catel was directed to proceed in accordance with contract specifications, including the work Catel allegedly believed to have been deleted. (R4, tab M) Clearing and grubbing and excavation in the graded area was essential to performance of the contract (tr. 93-94). Use of soil retention matting was a practical necessity and cost effective, given the wetness of the area, its susceptibility to erosion, and the likely frequency and cost of returning to reseed (tr. 94-96). By letter of 14 January 1999 Catel informed the Government that it was proceeding as directed, but that it reserved its right to seek an equitable adjustment (R4, tab N). Catel performed the work at issue (tr. 49-50).

15. Catel sought an equitable adjustment in the amount of $57,121 by letter of 9 February 1999, which was rejected by letter of 30 March 1999 (R4, tabs Q, R). Catel sought a contracting officer's decision by letter of 21 April 1999. Catel's claim had increased to $75,857.56, of which $18,736.56 was for an alleged differing site condition unrelated to the items addressed heretofore, which has subsequently been withdrawn (R4, tab S; tr. 50). Both the 9 February 1999 letter and 21 April 1999 claim assert that clearing, grubbing, graded area excavation, and soil erosion matting had ben deleted from the contract. Catel sought recovery for all such work performed, while not claiming work beyond the contract specifications. (R4, tabs Q, S) When a contracting officer's decision had not been issued in 60 days, an appeal was taken by letter dated 7 June 1999 (R4, tab A).

16. Mr. Pires testified there was clearing and grubbing that Catel would have to perform on this project (tr. 64). He also testified that he intended to reduce, but not delete, graded area excavation (tr. 24).

DECISION

Appellant argues, in effect, that the terms of the contract were amended by the first letter of 28 September 1998, and that its version of events leading up to the final proposal is more credible than respondent's. The record amply demonstrates that the contract specifications required the work at issue (findings 11-13). We understand Catel to agree that the contract specifications required the disputed work (app. br. at 11). Catel has not argued or claimed it performed work not required by the contract specifications and drawings. Respondent argues that Catel's interpretation is not supportable.

Although the contract specifications are clear, the inclusion of Catel's offer, which we interpret as including the 28 September 1998 final proposal (hereinafter "final proposal") (findings 6, 10), created this dispute. Specifically, the final proposal said that Catel had added piping and headwalls while reducing clearing, grubbing, graded area excavation, and soil retention matting. As to the additions, the contract specifications

unambiguously included piping and headwalls, and the final proposal merely confirmed that Catel had priced those items in its proposal, which it had not done initially. There is no dispute on those items.

None of the additions and reductions were individually priced or quantified in the final proposal. Catel, at the outset of the dispute and in its claim, characterized the reductions as complete elimination of the three items (findings 14, 15), although Catel now argues that the final proposal deleted clearing, grubbing and soil erosion matting, and decreased the amount of graded area excavation (app. br. at 10).[*] Catel argues that the Board must determine whether the parties agreed to deletion of clearing, grubbing, and soil erosion matting, and to a decrease in graded area excavation inconsistent with the contract specifications. We conclude there was no such agreement, and that the Government believed it had agreed only to unspecified reductions in the price of the contested items resulting in an overall contract price of $302,000 (finding 9).

This is not a case where one side knew of the other's interpretation and is bound by that knowledge. *Cf. Creswell v. United States*, 173 F. Supp. 805 (Ct. Cl. 1959). Neither is it a case where conflicting positions were clearly manifested and maintained throughout by both parties. *Cf. Lockheed Aircraft Corp. v. United States*, 462 F.2d 322 (Ct. Cl. 1970). Indeed, Catel's position at the hearing differs from its claim. It is, rather, a case of an interpretation which was not expressly and clearly divulged before award, and where the rule against the drafter, if applicable, works against Catel. *TRW, Inc.*, ASBCA No. 27299, 87-3 BCA ¶ 19,964. Thus, it is necessary for us to determine whether the interpretation advanced by Catel is reasonable. In the process we must also determine if the Government's interpretation is, in the circumstances, reasonable, and, if both interpretations are reasonable, whether the Government was required to make inquiry as to the intended meaning.

The Government argues that the word "reduction" cannot be interpreted so as to convey an intent to delete the disputed items. "In construing a contract, the language of the instrument is given its ordinary and commonly accepted meaning unless it is shown the parties intended otherwise." *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965). Accordingly, we look first to the ordinary meaning of the words "reduction" and "delete." In connection with the interpretation of a contract, it is appropriate to consult a recognized dictionary for definitions. 11 SAMUEL WILISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 30.10 (4th ed. 1993 & Supp. 1991). The root word of "reduction" is "reduce," which is defined as "[t]o lessen in extent, amount, number, degree, or price." *Webster's II New Riverside University Dictionary, s.v.* "reduce." "Reduction" is defined as "[a]n act or process of reducing." *Id., s.v.* "reduction." "Delete" is defined as "[t]o strike out or cancel, as from a text." *Id.,*

[*] Mr. Pires also testified the project required performance of some clearing and grubbing (finding 16).

s.v. "delete." We are aware of no trade usage which would alter the dictionary definitions. Thus, Catel's interpretation is not consistent with the ordinary meanings of the words, while the Government's interpretation is consistent with the ordinary meanings.

We must next determine if the parties' intention is other than that manifested by the ordinary meaning of the contract language. We must do this from an examination of the contract as an entirety. In this process, an interpretation which gives meaning to all parts is preferred to one which negates provisions or creates conflicts between provisions. *Hol-Gar Manufacturing Corp. v. United States,* 351 F.2d at 979. The record evidence has led us to find that the Government intended to award a contract under which Catel would perform the work required by the specifications for the price of $302,000 (findings 5, 9). However, Catel's intention to delete the items is not borne out by the record. Mr. Pires conceded that some clearing, grubbing and graded area excavation would be necessary (findings 4, 16). Thus, the meaning to be conveyed by use of the word "reduction" was not the deletion of those items, but "to lessen in . . . amount [and] price." By the testimony of Catel's president, it is established that Catel's final proposal was not intended to convey the interpretation it here advocates, and that Catel's intent was not to delete two of the three listed items but to reduce performance by some unspecified amount. Moreover, Catel has not claimed or argued that it performed some quantity of clearing, grubbing, and graded area excavation in excess of contract requirements. The record evidence of the parties' intent is consistent with the Government's stated intention to pay Catel $302,000 for performance of the contract in accordance with the solicitation as written (findings 5, 8, 9).

Insofar as it is appropriate for us to examine extrinsic evidence, *cf. McAbee Construction, Inc. v. United States,* 97 F.3d 1431 (Fed. Cir. 1996) (extrinsic evidence may not be introduced to interpret, vary, or add to the terms of an unambiguous integrated contract), such evidence confirms the plain and ordinary meaning of the contract's provisions. During negotiations it was determined that the Government estimate did not include clearing, grubbing and soil erosion matting. The requirement for these items was discussed and confirmed. Moreover, the post-negotiation memorandum documents an understanding that Catel had decreased the area for clearing and grubbing by half, to the amount the Government believed was actually needed, and decreased its unit price for both graded area excavation and soil erosion matting by 50 percent. With respect to graded area excavation, which Mr. Pires testified he intended to reduce, the post-negotiation memorandum indicates the only reduction was in unit price. (Finding 8) The parties' actions leading to contract award manifest an intention to reduce the price of, not delete, the disputed items, and thereby affirm the plain meaning of the contract language. We hold, therefore, that Catel's interpretation of the contract, by virtue of both the words of the contract and the parties' manifestation of intent, is not reasonable.

Assuming, *arguendo,* that an ambiguity was created by the final proposal, the evidence establishes circumstances under which it was reasonable for the Government to

interpret the term "reduction" as it did. The matter had been previously discussed and the Government's interpretation had been confirmed by those discussions. Given the circumstances and the ordinary meaning of "reduction," the clear requirements of the contract specifications (findings 11-13), the practical necessity of performance of the disputed work (finding 14), and the fact that Catel intended the ordinary meaning or "reduction" to apply to two of the three items (finding 16), we cannot conclude that any resulting ambiguity would have been so obvious as to require inquiry. The appeal is denied.

Dated: 23 January 2002

CARROLL C. DICUS, JR.
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. 52224, Appeal of Catel, Inc., rendered in conformance with the Board's Charter.

Dated:

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