ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Blueridge General, Inc.	)	ASBCA No. 53663
	)	
Under Contract No. DACA65-99-C-0052	)	

APPEARANCE FOR THE APPELLANT: Jack Rephan, Esq.
Rephan Lassiter & Warren PLC
Norfolk, VA

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
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OPINION BY ADMINISTRATIVE JUDGE TUNKS

This appeal arises from a contracting officer's final decision denying a claim for $23,495.20 for topping out gypsum wallboard partitions. Only entitlement is at issue.

FINDINGS OF FACT

1. On 19 July 1999, the Government awarded the subject contract to appellant to renovate Building 801 at Langley Air Force Base, Virginia. The contract price was $2,962,722 and the contract completion date was 4 June 2000. The contract price was later increased to $4,118,097 and the contract completion date was extended until 21 October 2000. (R4, tabs 2, 3)

2. Building 801 consisted of a basement and two upper floors. The work included demolition of the interior and construction of new offices and administrative areas. Although no ceilings were required in the basement, the contract required appellant to construct ceilings on the first and second floors. Most of the interior walls were to be constructed of gypsum wallboard (GWB). A secure area referred to as the "Security Compartmentalized Intelligence Facility" or SCIF was to be constructed on a portion of the second floor. (R4, tabs 2, 3 at 00700-95)

3. Division 9 of the specifications was entitled Finishes and included nine sections. Section 09250 of division 9 set forth the requirements for GWB. Section 09915 of division 9 contained the Color Schedule. (R4, tab 3)

4. Paragraph 3.5 of section 09250, entitled Taping and Finishing, provided that GWB was to be "taped, floated with joint compound, and sanded to produce surfaces ready for gypsum wallboard finishes." Paragraph 3.7 of that section, entitled Patching, provided that "[s]urface defects and damage shall be corrected as required to leave gypsum board smooth, uniform in appearance, and ready to receive finish as specified." (R4, tab 3)

5. In addition to the requirements for GWB, section 09250 included the requirements for metal studs (R4, tab 3). Mr. William S. Meadows, president of Dawn Construction, Inc. (Dawn), appellant's drywall subcontractor, conceded that metal studs were not a finish and that they belonged in a different division. He explained their inclusion in section 09250 by stating that "a spec writer takes liberties sometimes." (Tr. 81)

6. Paragraph 1.1 of section 09915 stated that "[t]his section covers only the color of the . . . materials and products that are exposed to view in the finished construction." Paragraph 2.2.6 of that section, entitled Interior Wall Finishes, listed paint and vinyl wallcovering (VWC) as finishes for interior walls. (R4, tab 3)

7. Drawings A-5, A-6 and A-7 contained the Finish Schedule - Demolition (demolition schedule). The demolition schedule indicated that "painted drywall" was to be demolished. (R4, tab 23)

8. Drawing A-13 contained the Finish Schedule New Work (finish schedule). The finish schedule listed paint and VWC as finishes for interior walls. GWB was not listed as a finish for interior walls. (R4, tab 23)

9. Drawing A-22 applied to all three floors of the building and set forth the details for the partitions. The type A detail, which is the subject of this dispute, set forth the requirements for interior non-rated GWB partitions (R4, tab 23, drawing A-22; tr. 26). The detail provided as follows:

(R4, tab 23, drawing A-22). "CONT" stands for continuous (supp. R4, tab 23, drawing T-2).

10. The record does not reflect that appellant requested clarification of the GWB requirements prior to bidding and appellant did not offer its bid documents into evidence.

11. On 30 August 1999, appellant awarded a subcontract to Dawn to construct the partitions (ex. A-1). Mr. Meadows testified that, in his experience, only rated walls extend to the concrete slabs above and that a finish is rarely, if ever, applied to GWB above the finished ceiling (tr. 35, 44-45, 52-53).

12. On 8 December 1999, appellant submitted Request for Information (RFI) # 48 to the Government, requesting clarification of, among other things, the requirements for the partitions in the SCIF area:

> The [air handling] system appears to be designed as though the above ceiling area in the skif [SCIF] is a plenum. The partitions details seem to show GWB going to the concrete structure above which kills the plenum effect. Please clarify.

(R4, tab 10)

13. The Government relayed the following advice from its architect-engineer (A/E) to appellant on 10 December 1999:

> The direction received [from the A/E] is that the area above the ceiling is in fact a plenum. Therefor [sic], the SCIF partitions are not to extend to the underside of the ceiling slab . . . unless there are fire wall considerations involved.

(R4, tab 11)

14. On 13 December 1999, the Government replied to RFI #48 as follows:

> 3) THE AREA ABOVE THE CEILING IN THE SCIF IS A PLENUM. THE GYP BOARD IS NOT TO GO TO THE UNDERSIDE OF THE SLAB BUT IS TO STOP ABOVE THE CEILING—WITH THE EXCEPTION OF FIRE WALLS & SECURITY WALL.

(R4, tab 10)

15. On 28 December 1999, appellant advised Dawn that the Government had directed the "[S]cif walls . . . to be from floor to concrete ceiling structure per contract details" (R4, tab 20). Mr. Meadows understood this to mean that the partitions in the SCIF area were to extend from the floor to the concrete slabs above (tr. 55).

16. On 4 January 2000, appellant submitted RFI #61, requesting clarification of the requirements for type A partitions in the non-SCIF areas (R4, tab 12).

17. On 16 February 2000, the Government via the A/E replied to RFI #61 as follows:

> All partitions must go to underside of deck above, which includes GWB . . . . Sheet A-22 clearly, graphically shows all partitions to deck. Detail A notes GWB each side of metal studs. The finish is noted to go to 4" above the ceiling. This is clearly shown as a separate, dashed line from the line of the GWB. GWB is not a finish.
>
> A note on detail A states to see the finish schedule for the finish. The Finish Schedule on sheet A-13 clearly shows wall finishes to be paint [or] VWC. . . . Nowhere on this sheet is GWB indicated as a finish.

(R4, tab 13)

18. On 17 February 2000, Dawn advised the Government that it interpreted the contract documents to mean that GWB was a finish. Dawn pointed out that GWB was included in section 09250 of division 9 of the specifications, that the demolition schedule contained on drawings A-5, A-6 and A-7 indicated that "painted drywall" was to be demolished and that if the A/E had wanted the partitions to extend to the slabs above, it could have required rated partitions instead of non-rated partitions. (R4, tabs 14, 15)

19. On 20 March 2000, the Government advised appellant that the type A partitions were to be full-height for sound purposes (R4, tab 21; tr. 53-54).

20. On 21 March 2000, Dawn inquired whether the Government's reply to RFI #61 included the partitions in the SCIF area (R4, tab 21). The Government replied that all type A partitions, including those in the SCIF area, were to extend to the slabs above (R4, tab 22).

21. Dawn subsequently topped out the type A partitions on the first and second floors so that they extended to the concrete slabs above. The Government waived the

requirement that the finish extend four inches above the ceilings and appellant did not apply any finish to GWB above the ceilings (tr. 82-83, 145).

22. On 22 February 2001, appellant submitted a claim on behalf of Dawn to the contracting officer for $23,495.20 for extending type A partitions on the first and second floors to the concrete slabs above (R4, tabs 17, 18, 19).

23. On 13 December 2001, appellant appealed the deemed denial of the claim (R4, tab 1).

24. On 20 February 2002, the contracting officer issued a final decision, finding that appellant was entitled to $1,780.61 for topping out 230 linear feet of type A partitions in the SCIF area. The remainder of the claim was denied. (R4, tab 2)

DECISION

This appeal arises from a dispute over the interpretation of the detail for type A non-rated GWB partitions on drawing A-22. Appellant contends that it reasonably interpreted a note on the detail that read "EXTEND FINISH 4" MIN ABOVE FINISHED CEILING" to mean that type A partitions were to extend four inches above the ceiling rather than to the concrete slabs above. The Government argues that the detail clearly required type A partitions to be full-height. In the final decision, the contracting officer conceded that appellant was entitled to $1,780.61 plus mark-ups for topping out type A partitions in the SCIF area and the Government does not dispute that (Gov't br. at 15). Thus, what is at issue here is the cost of topping out type A partitions on the first floor and type A partitions in non-SCIF areas on the second floor.

In interpreting the language of a contract, it is well-established that we read the contract as a whole and, to the extent possible, give reasonable meaning to all its parts. *Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d 854, 860 (Fed. Cir. 1997). A contract term is ambiguous if it is susceptible to more than one reasonable interpretation. *C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1544 (Fed. Cir. 1993). In order to prove that contract language is ambiguous, it is not enough to demonstrate that the parties interpreted the contract language differently. Both interpretations must fall within the so-called "zone of reasonableness." *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 751 (Fed. Cir. 1999). If both interpretations are within the zone of reasonableness, the general rule is that the ambiguity will be construed against the drafter under the doctrine of *contra proferentem.* In order to avail itself of the doctrine, however, the contractor must prove that it relied on its interpretation during bid preparation. *Fruin-Colnon Corp. v. United States*, 912 F.2d 1426, 1430 (Fed. Cir. 1990).

After carefully considering the contract documents, we conclude that the type A detail on drawing A-22 clearly required type A partitions to extend to the concrete slabs

above. The detail showed GWB and metal studs as two parallel double lines extending from the floor (or base) to the underside of the slabs (or decks) above. Where the partitions abutted the slabs, a note with an arrow pointing to the slabs above stated "CONT[INUOUS] SEALANT EACH SIDE, TOP AND BOTTOM." Another note on the detail stated "EXTEND FINISH 4" MIN ABOVE FINISHED CEILING" with an arrow pointing to a dashed line delineating the ceiling. The detail also included a note with an arrow pointing to the GWB that stated "PARTITION FINISH, SEE FIN SCH." The "FINISH SCHEDULE NEW WORK" on drawing A-13 indicated that the walls were to receive paint or VWC. The Finish Schedule did not identify GWB as a finish. In addition, paragraph 2.2.6 of section 09915, which listed interior wall finishes, did not list GWB as a finish.

Appellant argues that it reasonably interpreted the contract to mean that type A partitions were to extend four inches above the ceilings for the following reasons: (1) the contract, read as a whole, indicated that GWB was a finish; (2) the type A detail applied to all three floors even though the first and second floors had ceilings and the basement did not; (3) within the drywall industry, only rated partitions extend from floor to slab; and (4) the Government issued erroneous and contradictory interpretations regarding the type A detail.

In support of its first argument, appellant points out that the GWB section (section 09250) of the specifications was included in the Finishes division (division 9). However, the GWB section clearly indicated that GWB was not a finish. Paragraph 3.5 required GWB to be "taped, floated with joint compound, and sanded to produce surfaces *ready for [GWB] finishes*" (emphasis added). Paragraph 3.7 required "[s]urface defects and damage [to] be corrected . . . to leave [GWB] smooth, uniform in appearance, *and ready to receive finish as specified*" (emphasis added). Appellant also points out that the Finish Schedule-Demolition, drawings A-5, A-6 and A-7, indicated that "painted drywall" was to be demolished. Appellant's reliance on the demolition drawings is misplaced. The correct place to look for finishes for new work is the Finish Schedule New Work, drawing A-13, which was referenced on the type A detail as "FIN SCH." Drawing A-13 listed paint and VWC as finishes for interior walls; it did not list GWB. Appellant also points out that there is a conflict between section 09915, which stated that exposed surfaces were to be painted, and the type A detail which required the finish to extend four inches above the ceiling. This is a non-issue. The Government waived the requirement to have paint or VWC extend four inches above the ceilings and appellant did not apply any finish to GWB above the ceiling.

Appellant secondly argues that the detail was ambiguous because it applied to floors with and without ceilings. In our view, this dual application does not render the detail ambiguous. Assuming *arguendo*, however, that the detail is susceptible of two interpretations, appellant still could not prevail. In order to recover for a patent ambiguity, a contractor must demonstrate that it inquired about the ambiguity before bidding. In order to recover for a latent ambiguity, a contractor must prove that it relied upon its interpretation during bid preparation, *e.g.*, by producing its bid documents. *Burnside-Ott,*

107 F.3d at 860. In this case, appellant neither submitted a pre-bid inquiry nor produced its bid documents.

Appellant thirdly argues that it is not customary in the drywall industry to extend non-rated partitions, such as the type A partitions at issue here, to the concrete slabs above. Appellant's evidence of trade practice relies exclusively on the testimony of Mr. Meadows. In order to prove a trade practice, appellant must show that it reasonably relied on its interpretation during bidding. *Metric,* 169 F.3d at 752. Appellant did not submit its bid documents or otherwise prove how it interpreted the GWB requirements during bidding.

Appellant lastly argues that the Government issued "erroneous and contradictory" interpretations of the detail in the non-SCIF areas. We disagree. On 8 December 1999, appellant submitted RFI #48 requesting clarification of the type A requirements in the SCIF area. The Government replied on 10 and 13 December 1999 that the area above the ceiling in the SCIF was a plenum and that the partitions should stop above the ceiling. On 28 December 1999, the Government reversed that direction and stated that the partitions in the SCIF area were to be full height. On 4 January 2000, appellant submitted RFI #61 requesting clarification of the detail as it applied to the non-SCIF areas. The Government replied on 16 February 2000 that all partitions were to be full-height. On this record, we cannot conclude that the Government issued differing interpretations of how the type A detail applied to the non-SCIF areas.

Except for the type A partitions in the SCIF area, the appeal is denied. Quantum is remanded to the contracting officer.

Dated: 11 July 2003

ELIZABETH A. TUNKS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

EDWARD G. KETCHEN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

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. 53663, Appeal of Blueridge General, Inc., rendered in conformance with the Board's Charter.

Dated:

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