

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Arnold M. Diamond, Inc.) ASBCA No. 53725
)
Under Contract No. DACA21-99-C-0058)

APPEARANCE FOR THE APPELLANT: Mr. Nicholas Ruffus
Vice President

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
William A. Hough, Esq.
District Counsel
Henry R. Richmond, Esq.
Engineer Trial Attorney
U.S. Army Engineer District, Savannah

OPINION BY ADMINISTRATIVE JUDGE COLDREN

This appeal was taken from a final decision of the contracting officer denying appellant's claim seeking an equitable adjustment in the amount of \$81,594.94 because the scale on a contract drawing inaccurately depicted the number of feet of steam pipe to be demolished under the contract. The Government response is that either the scale was accurate or that appellant could not reasonably rely on that scale because the contract warned that the drawings were not to be scaled.

The appeal was submitted on the written record without a hearing under Rule 11. Only entitlement is at issue.

FINDINGS OF FACT

1. On 30 September 1999, the Government awarded a contract to appellant to demolish two buildings as well as steam lines running from an old boiler plant on Fort Bragg, North Carolina (R4, tabs 1, 3 at 00010-2). The length of the steam lines is what is at issue in this appeal.

2. Sheet 1 of the contract drawings is an index of the drawings for the demolition job. It depicts a Note 1 which provides as follows:

CONTRACTOR IS RECOMMENDED TO VISIT SITE AND
VERIFY SITE CONDITIONS BEFORE BIDDING. DO NOT
SCALE DRAWINGS.

It lists Sheet 7 as the Steam Line Site Plan. See finding 6. (R4, tab 5)

3. The Invitation for Bids included the FAR 52.236-3 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984) standard clause which provides as follows:

(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to . . . (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract.

(R4, tab 4)

4. Sheet 3 of the contract drawings is the demolition plan. It has a scale stating “1”=20’.” It also depicts a ruler which indicates when measured by the Board that 5/8-inch equals a foot. This confirms that this drawing is not a full size drawing. The drawing was not labeled as not being full size. (R4, tab 6)

5. Sheet 4 of the contract drawings is the grading and erosion control plan and has a scale stating “1”=20’.” It also depicts a ruler which indicates when measured by the Board that 5/8-inch equals a foot. This confirms that this drawing also is not a full size drawing. The drawing was not labeled as being other than a full size drawing. (R4, tab 7)

6. Sheet 7 indicates in its title block that its scope is “STEAM LINE/VALVE PIT DEMOLITION,” and has a scale stating “1”=100’.” Unlike the other contract drawings, it does not depict a ruler illustrating the scale.*

* This drawing was not included in the Rule 4 file for this appeal but was included as Tab 5 of the Rule 4 file for appellant’s appeal under the same contract docketed as ASBCA

7. No evidence was included in the record as to how appellant prepared its bid concerning the demolition of the steam lines, including whether it relied on the scale of Sheet 7 of the contract drawings. In addition, no evidence was included as to whether appellant performed a site visit before bidding or what a reasonable bidder would have learned had it performed such a site visit. Further, no evidence was included as to whether appellant knew that the drawings were reduced size rather than full size drawings.

8. Between 16 September 2000 and 29 September 2000, appellant's surveyor, The Rose Group, surveyed the dimensions of the trenches containing the steam lines to be demolished. The Rose Report indicated that its survey determined that the steam lines were 5,663 linear feet. It also scaled Sheet 7 of the contract drawings to determine dimensions of 3,607 linear feet. (R4, tab 10)

9. By a claim dated 9 January 2001, appellant sought \$81,594.94 on the ground that the contract plans and specifications were defective by 2,056 linear feet in showing the steam pipe to be removed when the drawing scale indicated 3,607 linear feet and the actual distance determined by survey was 5,663 linear feet (R4, tab 9).

10. By a letter dated 21 March 2001, the contracting officer wrote appellant that the contract warned appellant not to use the scale to determine how much steam line was to be removed (R4, tab 11).

11. A contracting officer's decision dated 7 November 2001 denying appellant's claim was issued (R4, tab 2). Not receiving that decision, appellant requested that the contracting officer issue a final decision on its claim by a letter dated 30 November 2001 (supp. R4, tab F). On 7 January 2002, the contracting officer re-mailed the final decision to appellant certified mail, return receipt requested (supp. R4, tab J). It was received by appellant on 23 January 2002 (supp. R4, tab K). A timely appeal was taken on 12 March 2002.

DECISION

Relying on *United States v. Spearin*, 248 U.S. 132 (1918), appellant contends that the contract drawings are defective in providing an erroneous scale which when the drawings are scaled indicates that 3,607 linear feet of steam pipe are to be removed when a survey indicates 5,663 linear feet. Appellant recognizes that the contract contains a clause which provides that the drawings are not to be scaled but instead recommends that appellant visit the site (finding 2). It argues that this clause is a broad verification and checking clause which *Spearin*; *Robert & Son Construction*, VABCA No. 3552, 93-3 BCA ¶ 26,113; and *White v. Edsall Construction Co.*, 296 F.3d 1081 (Fed. Cir. 2002), found were insufficient to overcome the

No. 53724. Both parties reference this drawing in their briefs; we deem it to be Tab 12 of the Rule 4 file (Gov't. br. at 2; app. br. at 1; app. reply br. at 1).

warranty of specification rule of *Spearin*. However, “verification requirements that are quite detailed and specific,” *Robert & Son Construction, supra*, 93-3 BCA at 129,791, or an “express and specific disclaimer,” *White v. Edsall Construction Co., supra*, 296 F.3d at 1085-86, will allocate the risk of specification or drawing error to the contractor.

Here, the language was specific with regard to scale. Language that either “[t]he drawings are not to be scaled” or “DO NOT SCALE DRAWINGS” has been held to allocate the risk of an error in the scale on a contract drawing to the contractor. *Brazos Roofing International*, ASBCA No. 48079, 95-2 BCA ¶ 27,638 at 137,783; *Robert McMullan & Sons, Inc.*, ASBCA No. 37173, 90-1 BCA ¶ 22,574 at 113,288. We hold that the language “DO NOT SCALE DRAWINGS” in the contract made it unreasonable for appellant to rely on that scale (assuming it did) in determining for bidding purposes the length of the steam pipe to be removed (finding 2).

The appeal is denied.

Dated: 1 July 2003

JOHN I. COLDREN, III
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMLER
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. 53725, Appeal of Arnold M. Diamond, Inc., rendered in conformance with the Board's Charter.

Dated:

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