

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
C & S Services, Inc.) ASBCA No. 54032
)
Under Contract No. N62791-01-C-0080)

APPEARANCE FOR THE APPELLANT: Clinton D. Hubbard, Esq.
San Diego, CA

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Kathleen A. Post, Esq.
Assistant Counsel
Pearl Harbor Naval Shipyard and
Intermediate Maintenance Facility
Pearl Harbor, HI

OPINION BY ADMINISTRATIVE JUDGE DICUS

This appeal arises from the contracting officer's denial of appellant's claim for \$97,574 due to excessive paint thickness in the bilges of the USS FREDERICK. The underlying contract is for maintenance on the USS FREDERICK. The parties have elected to proceed pursuant to Board Rule 11. * Only entitlement is before us. We sustain the appeal.

FINDINGS OF FACT

1. The contract at issue is Contract No. N62791-01-C-0080, awarded 3 August 2001 under Agreement for Boat Repair No. N00024-01-H-8755. The contract included Option Item 0010, Work Item 631-11-003, which involved overhaul and repair work on the USS FREDERICK, and specifically removal of paint in the bilge areas and repainting the bare metal areas. (R4, tabs 4, 5) Bidders were told to base their bids on the bilges having epoxy paint (R4, tab 5 at ¶ 4.3). The parties have not identified, and we have been unable to find, any contract or solicitation provision that requires bidders to make a shipcheck prior to bidding.

* As part of the evidentiary record, the parties have agreed to include submissions from earlier summary judgment motions listed at pp. 1-2 of appellant's brief, including statements of undisputed facts and the Board's findings in the motion decision. (31 July 2003 Joint Statement)

2. The USS FREDERICK was not available for pre-bid inspection, so the Navy made a ship of comparable age and class, the EX-USS BARBOUR COUNTY, available for shipcheck (R4, tab 1). Appellant's Mr. John Henderson made a shipcheck on the EX-USS BARBOUR COUNTY in June 2001. He reviewed structural conditions, but made no attempt to examine paint and had no idea as to whether paint conditions were similar to the USS FREDERICK. He received no information prior to bid as to any similarities in paint conditions between the two ships. (Declaration of John Henderson (Henderson dec.)) It is not disputed that appellant bid the contract in reliance on the bid of its painting subcontractor, West Coast Cleaning and Preservation, Inc. (WCCP). WCCP's bid was based on removing epoxy paint in the bilges that was less than 33 mils thick. (31 July 2003 Joint Statement of Agreement)

3. On 28 February 2002, appellant filed a request for an equitable adjustment of \$97,574 which was denied on 6 March 2002. The claim was a "pass-through" claim from WCCP asserting that paint thickness in the bilges averaged 33 to 42 mils. (R4, tabs 8, 9) The painting subcontract is not in the record. The request for an equitable adjustment was followed by a 22 April 2002 request for a contracting officer's decision and a 30 August 2002 contracting officer's decision denying the claim (R4, tabs 10, 11). A Notice of Appeal dated 26 November 2002 was filed with the Board and docketed as ASBCA No. 54032 (R4, tab 12).

4. Appellant has submitted the declaration of Kim Zeledon. Mr. Zeledon has extensive experience in Navy ship repair. It is Mr. Zeledon's opinion, and we find that, while it is useful to inspect a sister ship of the ship to be repaired for purposes of general structure and access configuration, it is not useful to inspect a sister ship for paint conditions. It is not standard industry practice in such circumstances to inspect a sister ship for paint conditions. It is his opinion, and we find, that appellant followed standard industry practice when it inspected the EX-USS BARBOUR COUNTY for structure and access but not for paint conditions. The Navy has not submitted evidence to rebut this. It is also his opinion, unrebutted on this record, and we find, that it "is the exception and not the rule" if two ships have similar paint conditions. (Zeledon dec.)

5. Appellant has submitted the declaration of Mr. Roger Gruben of WCCP. Mr. Gruben asserts therein that for non-structural conditions it is pointless to make a site inspection of a ship of comparable class and age because conditions vary randomly from ship to ship. He also states that there were substantial differences in the USS FREDERICK and the EX-USS BARBOUR COUNTY. He asserts the conditions encountered on the USS FREDERICK involved surfaces with "paint thickness of 33-42 mils, with some areas as high as 50 to 90 mils." This made performance more costly than anticipated at time of bidding. The conditions were unique in Mr. Gruben's experience over the last 15 years, as 98 percent of surfaces encountered in that period fell between 8-20 mils. This is consistent with the Navy's requirement to strip all old paint to bare metal and not paint over existing painted surfaces. (Gruben dec.)

6. The Navy has submitted an affidavit and photographs documenting measurements taken on the EX-USS BARBOUR COUNTY on 12 December 2002. The Navy maintains this evidence demonstrates that the paint thickness in the bilges of the two ships was sufficiently comparable that inspection of the EX-USS BARBOUR COUNTY “would have revealed the same paint conditions that existed onboard the USS FREDERIC [sic] at the time of bidding and shipcheck.” The Navy’s photographs and affidavit document that a gauge for taking dry film thickness readings was used and that the measurements were taken from readily accessible places. The readings range from 10.2 to 86.8 mils. (Navy mot., attachs. 3, 4) The Navy has also submitted the affidavit of Carl Okuma, who asserts that, based on his 20 years of experience with the Navy’s Supervision of Shipbuilding function, it is absolutely necessary for a bidder to verify existing paint thickness (Navy mot., attach. 1 at 2). Additionally, the port engineer for the USS FREDERICK, Richard Tudor, states in his affidavit that the EX-USS BARBOUR COUNTY “presented an excellent platform for inspection: the spaces were clear, the bilges were dry, the ship itself was quiet and well lit and most of the areas were accessible for inspection . . .” (Navy mot., attach. 2).

7. NAVSEA Standard Item No. 009-32 was included in the contract by reference (R4, tab 5 at 1, 4). It requires power cleaning of bilge surfaces to bare metal followed by total system coverage from 8-12 mils (Gruben dec., ex. A). In nearly every bilge work item in Mr. Gruben’s experience, there has been a requirement of stripping the paint down to bare metal (Gruben dec.).

DECISION

Appellant argues that it acted reasonably in basing the painting portion of its bid on the bid of WCCP, and that WCCP acted reasonably in basing its bid on past experience rather than on an inspection of the EX-USS BARBOUR COUNTY. The Navy argues the contract is clear on the painting requirement, and that the actual conditions on the USS FREDERICK and the EX-USS BARBOUR COUNTY were sufficiently similar that an inspection of the paint in the bilges of the latter would have resulted in a bid that accurately reflected the work required on the former.

It is undisputed that appellant bid expecting paint in the bilges less thick than the paint it encountered, and ultimately removed. It is also undisputed that a shipcheck of a sister ship is useful for structural considerations. Whether a shipcheck for non-structural matters such as paint conditions would be useful is very much in dispute. However, evidence is compelling that the USS FREDERICK and EX-USS BARBOUR COUNTY both had epoxy paint in the bilges that exceeded 33 mils. This leads us to conclude that, if measured, the conditions on the EX-USS BARBOUR COUNTY would have produced an accurate bid for work on the USS FREDERICK. However, appellant has submitted evidence, not rebutted by the Navy, that this “is the exception and not the rule,” and that

measuring paint conditions on a sister ship in bidding is not part of any industry standard. We have so found (finding 4).

The Navy contends that appellant's argument that it was reasonable to base its bid for painting conditions on its experience rather than on conditions discoverable by inspection of the EX-USS BARBOUR COUNTY is fraught with inconsistencies, most notably that appellant based its bid on experience with numerous ships while rejecting the opportunity to prepare its bid based on inspection of a ship made available to bidders for the singular purpose of bid preparation for work on the USS FREDERICK. The Navy's argument misses a significant point. The Navy standard for painting bilges requires stripping to bare metal and coverage to 12 mils (finding 7). This was known to WCCP and is consistent with Mr. Gruben's experience (findings 5, 7) and consistent with the basis for the bid (finding 2). Moreover, we have found that industry practice does not contemplate inspecting a sister ship for paint conditions (finding 4), and we have also found there was no discernible contract or solicitation requirement for a shipcheck (finding 1).

In *Southwest Marine, Inc.*, ASBCA Nos. 26053, 26956, 85-3 BCA ¶ 18,226, we held in similar circumstances - specifications calling for a maximum allowable thickness of 12 mils and lack of access to the area actually to be painted - that the contractor was entitled to an equitable adjustment:

Since the evidence demonstrates that the maximum thickness ZARCON could have reasonably expected was 12 mils, its belief that it would encounter substantially less than 20 to 28 mils was reasonable.

Appellant is entitled to an equitable adjustment for sandblasting the paint millage in the ballast tanks in excess of 12 mils.

Id. at 91,490.

In *Southwest Marine*, the Navy did not grant pre-bid access to the areas of the ship where the additional work was necessary. Further, in that appeal we compared the specification requirements for paint thickness with the contractor's bid and found the specifications supported the contractor. Here, it was the ship itself that was not available for inspection, and a similar situation existed with respect to the specification requirement for paint thickness. We hold, based on industry standards and practical considerations, that appellant was not required to inspect the EX-USS BARBOUR COUNTY for paint conditions. Appellant's bid was reasonable. The appeal is sustained. The matter is returned to the parties to negotiate quantum.

Dated: 14 August 2003

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

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. 54032, Appeal of C & S Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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