ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
CKY, Inc.	)	ASBCA No. 54181
	)	
Under Contract No. DACW05-00-C-0034	)	

APPEARANCE FOR THE APPELLANT: Mr. Timothy Yu
President

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Carl Korman, Esq.
Engineer Trial Attorney
US Army Engineer District,
Sacramento

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

CKY appeals the denial of its claim for compensation for providing 48,998 cubic yards of fill and acceleration of performance on a river levee protection contract. The parties have submitted the appeal for decision under Rule 11. Only entitlement is before us. We find the claim without merit and deny the appeal.

FINDINGS OF FACT

1. The contract was awarded to CKY on 15 August 2000. The specified work included, among other things, (i) stripping six inches of vegetation and top soil from a river levee slope, (ii) placing a 12-inch thick layer of stone protection on the stripped surface, (iii) filling the voids in the stone protection with soil, and (iv), placing a 12-inch thick soil cover on top of the stone protection layer. (R4 Vol. I, tab 3 at dwg. sheets 12-13, tab 6 at 02229; Vol. II at 02200, 02212)

2. The contract schedule had separately priced line items for the embankment soil fill (Item 0004) and for the stone protection layer (Item 0006). Both items were unit price estimated quantity items. The estimated quantity specified by the government for Item 0004 was 90,100 cubic yards. The unit price for Item 0004 bid by CKY was $12.00 per cubic yard. (R4, tab 3 at 4)

3. Measurement for payment for Item 0004 was specified at paragraph 1.4.1 of specification section 02229 in relevant part as follows:

> 1.4.1 Measurement
>
> Embankment materials and required fill materials for filling the voids in the stone protection and as a cover layer over the stone protection, as specified in this section, will be measured for payment by the cubic yard and quantities shall be determined by the average end area method.
>
> The difference in volume will be determined by establishing and comparing "before construction" and "after construction" cross sectional areas. Surveys for quantity measurements will be made by calculating the embankment volume using the average end-area method . . . .
>
> The "before construction" cross sections of the areas to be filled will be taken prior to the filling operation after clearing, grubbing, stripping of the levee slope . . . . The "after construction" cross sections will be taken after accepted stone protection placement are completed, and the final cross sections from the grades, side slopes, crown widths, and other dimensions shown on the drawings or modifications thereof as directed by the Contracting Officer, with the following limitations:
>
> . . . .
>
> No measurement for payment will be made for the embankment materials used to fill in the voids within the stone protection.

(R4, tab 6 at 19-20)

4. On 30 August 2000, the government's project manager and designated contracting officer's representative (COR) for the contract, Mr. John McCain, conducted a "coordination meeting" with the CKY project manager, Mr. Mark Hallock, and other representatives of CKY. Mr. McCain's signed declaration under penalty of perjury[*] states that at this meeting:

> 4. . . . We went over the procedures for measuring work done under [Item 4] and how we would calculate payment to the

[*] Pursuant to 28 U.S.C. § 1746, this declaration has "like force and effect" as an affidavit or sworn declaration.

> contractor. Everyone at the meeting agreed that there would be no pay for dirt fill between rocks because there was no way to measure for spaces between the rocks. CKY indicated that they understood this and had no problem with it. CKY stated that they had based their bid on an understanding that there would be no pay for dirt between the voids in rocks.
>
> 5. The contract called for CKY to survey the site after clearing the vegetation. We discussed the survey requirements at the Coordination Meeting. We agreed that it would be nonproductive to do a survey of the levee after clearing the vegetation, and before placing the rock, since the spaces between the rocks were not part of the pay item. We agreed to delete the requirement for a survey after clearing the site. We did agree, however, that there would be an initial survey of the site in its native condition for the purpose of getting an idea of the "lay of the land" before the work started.
>
> 6. We agreed that the standard of measurement for the dirt fill would be a measurement of "top of rock to top of fill."

(Ex. G-1)

5. The record in this Rule 11 proceeding contains no affidavit, declaration under penalty of perjury, or other credible evidence disputing the foregoing statements of Mr. McCain. Those statements are also corroborated by the subsequent conduct of CKY during performance of the contract. *See* findings 8, 9, 10, and 13 below. We find Mr. McCain's declaration accurately states the discussion at the coordination meeting with respect to measurement for payment of the embankment soil fill item.

6. CKY subcontracted the stripping, stone protection layer and embankment soil fill placement to DD-M Crane and Rigging (R4, tab 6 at 1,4). CKY subcontracted the embankment soil fill surveys and quantity calculations to Genesis Engineering. Genesis performed three surveys. The initial survey was performed before DD-M did any work on the site. The second survey was performed after the placement of the stone protection layer. Genesis called this survey "our 'base plate' survey for our quantity calculations." The third and final survey was performed after the 12-inch soil cover over the stone protection layer was placed. No survey was performed after the stripping and before the placement of the stone protection. Genesis calculated 81,479 cubic yards of soil placed in the embankment on the basis of the difference between its base plate ("top of rock") and top plate ("top of final embankment") surveys. (R4, tab 6 at 27)

7. In three letters to CKY, all dated 10 January 2001, DD-M claimed payment for providing additional cubic yards of embankment fill over and above the "81,500" cubic yards shown in the Genesis survey computation. The claimed additional cubic yards was different in each of the letters, ranging from 35,515 to 43,316, but all claimed amounts appeared to be based on the truckloads of soil deposited on the site. (R4, tab 8A at 3, 5, 7, 9, 11, 15)

8. In a letter to the government dated 25 January 2001, CKY made no reference to the DD-M claims and stated that it agreed that the embankment soil fill pay item (Item 0004) should be reduced by 8,621 cubic yards. This reduction conformed Item 0004 to the Genesis survey and was in accordance with the agreement at the 30 August 2000 coordination meeting. (R4, tab 8g at 4)

9. In his declaration under penalty of perjury, Mr. McCain states that he was informed of the DD-M claims as follows:

> 7. After the embankment fill work was done, CKY prepared a survey of the embankment fill work that was completed. CKY and the [government] agreed on the results of the survey data. In numerous subsequent conversations with CKY's Mark Hallock, and on at least one occasion with Timothy Yu, the President of CKY, I was told that the request by DD-M for additional quantities of embankment fill had no merit and that CKY had no intention of forwarding DD-M's request to the [government].

(Ex. G-1 at 1-2)

10. The statements in paragraph 7 of Mr. McCain's declaration are corroborated by CKY's 25 January 2001 letter (*see* finding 8 above) and by CKY's 20 March 2001 letter to the government. That letter provided, at DD-M's request, copies of DD-M's 10 January 2001 claims to the government. The transmittal letter, however, did not endorse or otherwise sponsor the DD-M claims. It stated:

> Our subcontractor, DD-M Crane and Rigging, submitted the attached claims to us in January. All three versions are dated January 10, 2001. At the time DD-M also provided copies of some or all of these claims to the [government]. CKY did not forward these claims to your office, nor make any request for payment based on these claims. Our subcontractor, DD-M Crane and Rigging has requested that we provide copies of their claim to you. Thusly, we have attached copies for your file.

(R4, tab 8A at 1)

11. By letters dated 22 and 23 March 2001, DD-M requested payment from CKY for a total quantity of 130,477 cubic yards under the embankment soil fill line item (R4, tabs 8b and 8c). This quantity was based on a calculation by Genesis of the volume of the soil cover and the stone protection layer as measured from an assumed grade three inches below the original grade of the levee slope (R4, tab 6 at 27). An assumed grade for the calculation was necessary because, pursuant to the parties' agreement at the 30 August 2000 coordination meeting, Genesis had not surveyed the actual grade after stripping and before placement of the stone. *See* findings 4 and 6.

12. By letter to CKY dated 29 March 2001, the COR commented on the issues raised in DD-M's claim letters of 10 January and 23 March 2001. Among other things, he cited verbatim the statement in paragraph 1.4.1 that: "No measurement for payment will be made for the embankment materials used to fill in the voids within the stone protection." He concluded that the only purpose of the survey was to determine the thickness of the fill over the stone protection, that the fill in the voids within the stone protection was a no-pay item, and that there was no merit in DD-M's claims. (R4, tab 8e)

13. On 9 and 10 April 2001, CKY and the government respectively executed bilateral Modification No. P00006 to the contract. This modification incorporated into the contract the agreement on 25 January 2001 for a reduction of the 90,100 cubic yard estimated quantity for the embankment soil fill pay item (Item 0004) to the actual surveyed quantity of 81,479 cubic yards. This resulted in a reduction of $103,452 in the price for Item 0004. Modification No. P00006 also included the following provision:

> It is understood and agreed that, except for the adjustment herein made, excessive variations from the estimated quantities of pay item as listed in the contract schedule of payments shall not form the basis for further change in price subject to payment at existing contract unit prices for the actual quantities of work performed.

(R4, tab 8g at 1-3)

14. By letter dated 13 May 2002, more than one year after executing Modification No. P00006, CKY submitted a certified claim for $587,976 for an additional 48,998 cubic yards of embankment soil fill under Item 0004, and an equitable adjustment of $260,689 for "acceleration" allegedly caused by the additional quantity of fill (R4, tab 6 at 1, 3, 6). By final decision dated 5 February 2003, the contracting officer denied the claim (R4, tab 2).

15. There is no evidence that CKY made any inquiry of the government prior to contract award as to the proper interpretation of paragraph 1.4.1, or that it relied in its bid on its presently asserted interpretation of that paragraph, or that it relied in its bid on a subcontract bid by DD-M that relied on that interpretation.

DECISION

The issue in this appeal is the interpretation of specification section 02229, paragraph 1.4.1, quoted in finding 3 above. CKY relies (i) on that portion of the first sentence of paragraph 1.4.1 which states: "materials for filling the voids in the stone protection . . . will be measured for payment by the cubic yard," and (ii) on the specified method of measurement which requires that the "before construction" cross sections be taken "prior to the filling operation after clearing, grubbing, stripping of the levee slope." The government argues that CKY's interpretation is unreasonable because it ignores (i) the phrase "as specified in this section" in the first sentence of paragraph 1.4.1 and (ii) the express limitation in the method of measurement provisions which states "No measurement for payment will be made for the embankment materials used to fill in the voids within the stone protection."

We agree with the government. The first sentence of paragraph 1.4.1 does not contain an unqualified mandate that the materials for filling voids in the stone protection will be measured for payment. The mandate is qualified by the phrase "as specified in this section." It is expressly specified in that section, as one of the "limitations" on the prescribed method of measurement, that no measurement for payment will be made for the materials used to fill voids in the stone protection. Moreover, CKY's present interpretation of paragraph 1.4.1 is inconsistent with the contract provisions for separate payment of the stone materials under Item 0006. *See* finding 2. CKY's present interpretation makes the entire volume of the stone protection layer payable as embankment soil fill under Item 0004 where most of that volume was occupied by the stone payable under Item 0006. Reading the contract as a whole, according a reasonable meaning to all terms, and assuring that no contract provision is made inconsistent, superfluous or redundant, we find CKY's present interpretation unreasonable. *Lockheed Martin IR Imaging Systems, Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997).

Moreover, from the time of award and throughout performance of the work, CKY agreed with the government's interpretation. It agreed with the government's interpretation when the issue was discussed at the post-award coordination meeting. *See* finding 4. Its engineering subcontractor, Genesis, surveyed and initially calculated the embankment payment volume on the basis of the interpretation agreed upon at the coordination meeting. *See* finding 6. After the work was completed, when DD-M submitted its initial claims for quantities in excess of the Genesis calculation, CKY told the government that the claims were without merit. *See* finding 9. When CKY sent those claims, at DD-M's request, to the government, its transmittal letter did not adopt those

claims as its own or sponsor them in any way. *See* finding 10. And, when it entered into bilateral Modification No. P00006 on 9 April 2001 for payment of the embankment fill pay item, CKY did so, without demur, on the basis of the agreed interpretation of paragraph 1.4.1 and with full knowledge of the contrary interpretation then being argued by DD-M. *See* findings 11 and 13. CKY did not submit its claim based on the DD-M interpretation until more than one year later on 13 May 1992. *See* finding 14. We give great if not controlling weight to the interpretation of paragraph 1.4.1 by both CKY and the government during performance of the contract. *Ver-Val Enterprises, Inc.*, ASBCA No. 43766, 95-1 BCA ¶ 27,334 at 136,232.

Finally, even if we were to hold that paragraph 1.4.1 was either patently or latently ambiguous, CKY would not be entitled to recover. There is no evidence that it made inquiry of a patent ambiguity before bidding, that it relied in bidding on its now-asserted interpretation of a latent ambiguity, or that it relied in bidding on a subcontract bid from DD-M that relied on that interpretation (finding 15). *See Dalton v. Cessna Aircraft Co.*, 98 F.3d 1298, 1306 (Fed. Cir. 1996) (recovery for patent ambiguity requires pre-bid inquiry for clarification) and *Fruin-Colnon Corp. v. United States*, 912 F.2d 1426, 1429-32 (Fed. Cir. 1990) (recovery for latent ambiguity requires proof of reliance in bidding).

The appeal is denied.

Dated: 6 June 2005

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

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. 54181, Appeal of CKY, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals