ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
ADT Construction Group, Inc.	)	ASBCA No. 55125
	)	
Under Contract No. DACA09-03-C-0009	)	

APPEARANCE FOR THE APPELLANT: John W. Ralls, Esq.
Thelen Reid & Priest, LLP
San Francisco, CA

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Lawrence N. Minch, Esq.
District Counsel
Gilbert H. Chong, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Los Angeles

OPINION BY ADMINISTRATIVE JUDGE STEMPLER

This is a timely appeal from a contracting officer's final decision denying appellant's (ADT Construction Group, Inc.) (ADT) claim for alleged additional costs for importing fill in the performance of the subject contract. Both parties have waived a hearing and submitted the appeal on the record pursuant to Rule 11.[1] The Contract Disputes Act (41 U.S.C. §§ 601 *et seq*.) is applicable. We are to decide entitlement only (Board order dated 31 October 2005).[2]

[1] The record consists of Rule 4 documents, tabs 1-27. Additionally, on 9 January 2006, appellant filed its main brief with attached affidavits. On 6 February 2006, the government filed its reply brief with an attached declaration. On 14 February 2006, appellant responded to the government's reply brief and attached an affidavit. On 22 February 2006, the government filed a sur-response to appellant's response. On 2 March 2006, appellant filed a supplemental reply brief.

[2] In its briefs of 9 January, 14 February, and 2 March 2006, appellant asks us to decide quantum as well as entitlement (9 January brief at 18-19; 14 February brief at 12; 2 March brief at 7). The government objects to the Board deciding quantum (22 February brief at 14-15). The Board's 31 October 2005 Order stated that we would be deciding entitlement only. The evidence and arguments were submitted on that basis. We will decide entitlement only.

FINDINGS OF FACT

1. On 21 April 2003, the U.S. Army Corps of Engineers, Los Angeles District issued Solicitation No. DACA09-03-R-0004. The solicitation was for a 100% 8(a) disadvantaged small business set-aside contract for an F-22 munitions maintenance facility at Nellis Air Force Base, Nevada, to be designed and built by the contractor after demolition of an existing facility. The solicitation had a target ceiling of $2,700,000. (R4, tab 3)

2. The drawings for the Request for Proposals (RFP), and the subsequent contract, contained Drawing No. G1.2, "VICINITY MAP, BASE MAP, & SYMBOL LEGEND." This drawing contained a note which stated: "NOTE: NO BORROW OR SPOIL AREAS ARE AVAILABLE ON BASE" (R4, tab 4). Prior to submitting its offer, ADT was aware that the note was on the drawings, however "I [Jess J. Franco, ADT's Senior Vice-President, preparer of its offer and program manager] did not read that note as a considered rejection by the Corps of the use of on-base material as fill material nor did I read that note as one of the design requirements for the Project like the location, size and configuration of the building." (R4, tab 20, at 3; Affidavit of Jess J. Franco (Franco aff.), ¶¶ 1, 5, 13-14, 21; Declaration of Tina A. Frazier (Frazier decl.) (contracting officer) ¶ 2)

3. On 6 May 2003, a pre-proposal conference was held at which the prospective contractors could walk the site. Mr. Franco attended the conference and observed areas adjacent to the construction site from which he envisioned the large quantity of fill necessary for the project (50,500 CY) might be obtained. The use of at least one of these areas for needed fill had the potential that its removal would leave that area level and usable for other purposes. Mr. Franco's notes of the visit reflect that he felt that importing fill would be too costly to meet the government's target ceiling of $2,700,000. (R4, tab 23; Franco aff. ¶¶ 15-19)

4. On 15 May 2003, ADT emailed the contract specialist and asked:

> Is there a site/area on the Base <or> within Area 2 that can be used for borrow material to fill the depression? Can the mound of earth across First Street to the NE of the new bldg site be used for borrow material? Can the Area directly to the West of the ravine (behind the new bldg site) be used for borrow material?

(R4, tab 6; Franco aff. ¶ 22) The government never responded to this email. (Franco aff. ¶ 23)

5. On 21 May 2003, ADT submitted its proposal. The solicitation had directed offerors to submit their proposals in two volumes: pricing and technical. The offerors were instructed not to put any pricing information of any nature in their technical proposals in order to avoid having the technical evaluators biased by this information. (R4, tab 3, at 00043; Frazier decl. ¶ 3) Accordingly, the technical evaluators evaluated only information related to the technical acceptability of the proposal (Frazier decl. ¶ 4) and the price evaluators did not review information in the technical proposal (Frazier decl. ¶ 5). On page 14 of its technical proposal, appellant had the following statement:

> ASSUMPTIONS/REMAINING QUESTIONS
>
> . . . .
>
> We assumed that a [sic] on-base borrow area was available. Is this correct <or> will a borrow site off the Base be required? This will have a cost impact.

(R4, tab 7 at 01098) ADT assumed in its proposal that it would not have to import fill to allow itself to submit a proposal below the government's target ceiling figure. Mr. Franco believed that if the government disagreed with ADT's assumption, the government would negotiate the matter with ADT prior to final offers (Franco aff. ¶¶ 24-25).

6. On 11 June 2003, ADT submitted its final cost proposal revision. None of its proposals reveal what amount ADT was including in its offer for the fill work in dispute (R4, tab 14). ADT did not introduce any of its offer preparation documents into evidence.

7. On 17 June 2003, ADT was awarded the contract for $2,691,475 (R4, tab 16). Three other firms had submitted offers of $2,780,725.46, $2,921,772.00, and $3,221,015.00 respectively (R4, tab 2; Frazier decl. ¶ 1). ADT's proposal was evaluated as the lowest priced, technically acceptable offer. When the contracting officer accepted ADT's offer, she relied on the statement in block 17 of ADT's proposal (SF 1442) that states that the offeror will perform in strict accordance with the specifications (R4, tab 16 at 01390; Frazier decl. ¶¶ 1, 8-9). The contracting officer states that had she known of the on-base fill "contingency", she would have entered into negotiations with ADT and advised it that it must comply with drawing G1.2 and remove the "contingency" (Frazier decl. ¶ 10). ADT's proposal was incorporated into the contract (compl. ¶ 8; am. answer ¶ 8).

8. The contract contains the standard FAR 52.243-4 CHANGES (AUG 1987) clause (R4, tab 3 at 00064).

9. In discussions with the end user in July 2003, ADT found out that unidentified employees of the end user (the Air Force) liked the idea of ADT's identified potential borrow area becoming usable space. ADT then directed its geotechnical consultant to proceed to investigate whether the composition of the area was such that the soil could be used as fill. The soil was suitable. (R4, tab 24; Franco aff. ¶¶ 30-31)

10. In October 2003, ADT met with unidentified employees of the Corps to present ADT's design to date. The unidentified employees did not object to the on-base aspects of the design (*i.e.*, 60% drawings that depicted possible borrow sites) (R4, tab 26 at 01527; Franco aff. ¶ 32).

11. In November 2003, unidentified employees of the Corps told ADT that the fill would have to be found off-base (Franco aff. ¶ 33).

12. On 19 May 2004, Mr. Franco sent the contracting officer a letter requesting that the Corps allow ADT to use specified on-base areas for fill. The letter does not mention any prior refusal to allow on-base fill to be obtained nor does it reference ADT's assumption/question that was in its proposal that was incorporated into the contract. (R4, tab 25) Mr. Franco states that the Corps refused to allow the use of on-base fill (Franco aff. ¶ 33).

13. On 29 November 2004, ADT entered into a contract with a site subcontractor using the assumption that off-base fill was to be used. Importation of fill then began. (R4, tab 27; Franco aff. ¶ 34; Franco reply aff. ¶ 7(g))

14. In his reply affidavit, Mr. Franco states that Ms. Frazier was present at a meeting on 7 January 2005 at which ADT advised her that it would file a claim for the importation of fill. No notes of this meeting have been produced. (Franco reply aff., ¶ 7(h))

15. On 16 March 2005, ADT submitted a request for equitable adjustment to the contracting officer. The request was for $506,514 in alleged additional costs ADT incurred in importing fill from off-base. (R4, tab 18) Ms. Frazier states that receipt of this letter was her first knowledge of ADT's assumption that it could use on-base fill in performance of the contract (Frazier decl. ¶ 11).[3]

[3] We need not decide whether the contracting officer's first notice that ADT considered that the contract allowed it to use on-base fill was in January or March 2005. The fact has no bearing on the outcome of the appeal.

16. On 28 April 2005, ADT's site-work subcontractor sent a letter to ADT estimating the lower costs it would have incurred if it had used on-base fill rather than importing the 50,500 CY of fill necessary for the construction as set out in its subcontract. The subcontractor estimated that it would have cost it $281,790.00 less to use on-site fill and it would have taken it six working days less. (Affidavit of Darren Keser ¶ 3, *see* attachment)

17. On 29 April 2005, ADT submitted a certified claim to the contracting officer for $335,032.32[4] and six working days of delay for importing fill from off the base. ADT alleges preparation of the site footprint was on the critical path and use of off-base fill caused 6 working days of delay or 10 calendar days of delay. (R4, tab 20; Franco aff. ¶¶ 35-39)

18. On 18 August 2005, the contracting officer issued a final decision denying ADT's claim in its entirety (R4, tab 2).

19. On 22 August 2005, ADT filed a timely appeal (R4, tab 1).

CONTENTIONS OF THE PARTIES

Appellant contends that because ADT's pricing assumption that an on-base borrow area would be available was disclosed in its proposal, and the proposal was incorporated into the contract, that the government's refusal to allow ADT to obtain fill from an on-base source was a change to the contract. ADT alleges it is entitled to compensation and a six working-day extension. ADT argues first that the government accepted its offer with the assumption in it and that principles of offer and acceptance require that the government's acceptance of its offer sets the relevant term in the contract and allows the use of on-base fill.

Alternatively, ADT argues that both the drawing note and its proposal assumption are terms of the contract and offers an interpretation of the drawing note that it states harmonizes both provisions.

The government contends that its drawing note is clear and that appellant's "contingency" is unreasonable because it conflicts with a clear provision of the solicitation. The government states that ADT's inclusion of a "contingency" in its proposal renders its offer non-responsive and enforcing the contingency would result in ADT obtaining an unfair price advantage over the other offerors.

[4] Mr. Franco states he made an input error in ADT's claim and revised it to $334,794.70 (Franco aff. ¶ 35, *see* attachment).

Alternatively, the government contends that there was no meeting of the minds on a material term of the contract and that no contract arose when the contracting officer awarded the contract to ADT. The government sees its award as a counter-offer that was accepted by ADT by performance of the site work using off-site fill without objection or complaint.

Thirdly, the government argues that the Order of Precedence clause of the contract resolves the dispute in its favor.

DECISION

The parties have ably briefed many legal principles that they argue should be applied to this appeal. The legal areas discussed vary from mistake-in-bid, to principles of offer and acceptance and contract formation, to principles of contract interpretation related to ambiguities, to construction of the order of precedence clause in the contract, to rules governing responsiveness of offers to implied contracts. We do not think these principles need to be considered once one makes a close examination of ADT's communications to the government.

Initially, we observe that the note on RFP and contract drawing G1.2 is clear and ADT was fully aware of it (finding 2). It states without equivocation that no borrow areas are available on the base. ADT offers us an alternative interpretation of the note. ADT states that it interpreted the note not as a statement that no borrow areas were to be made available, but as a statement that the government did not know if any borrow areas were of sufficient quality to be used on the contract and that if ADT was willing to take the risk that they were not, the borrow areas were available. (App. br. at 3) The note is clear and ADT's interpretation cannot be reasonably arrived at from the language of the note. We reject it.

It is also clear to us that ADT did not have this interpretation during the relevant time periods. ADT's pre-proposal email of 15 May 2003 (finding 4) was not phrased in such a manner as to suggest that it believed that it had a right to use areas of the base for borrow, but phrased as a question whether the government will allow such use. Given the clarity of the drawing note, the email can only be reasonably understood as a request for the government to change the drawing note or eliminate it.[5] Appellant did not receive an answer to this inquiry and the only reasonable assumption that an offeror could make from this is that the note remained in effect. ADT argues that, it:

[5] While we do not countenance the government's failure to respond to the email, the failure to respond can hardly be said to constitute a revision of the RFP drawing for this one offeror.

> was forced to make an assumption in this regard, and qualify its pricing, because: (1) ADT had raised the issue before proposals were due, but had received no response from the Corps; and (2) ADT was attempting to come under the Government's target ceiling price (and was the only offeror to succeed in doing so).

(App. supp. reply br. at n.2) Appellant was not forced into its assumption and we consider the assumption to have been unreasonable.

On 21 May 2003 ADT then submitted its initial proposal (finding 5). ADT included a statement essentially stating that it had assumed that the drawing note had been changed in its pricing but if the note had not been changed, it would have to change its price. Again, the statement is not phrased such that ADT considered itself to have a right to use on-base borrow, but was phrased as a question as to whether it would have to use an off-base site. There was nothing in the RFP or the government's conduct that would reasonably encourage ADT to make its assumption. The failure of the government to respond to a request to change a solicitation/contract term cannot be seen as an elimination of the term.

ADT's placing of its assumption/question in its initial proposal was an opportunity for the government to recognize ADT's misapprehension and correct it. Unfortunately, ADT's disregard of the instructions (finding 5) for proposal submission resulted in the contracting personnel not reviewing the assumption/question. Nonetheless, the fact still remains that ADT had not received notice of a change in the RFP/contract drawing note and it must also have realized that the RFP had not been amended to delete or change the note which was, of course, required if on-base borrow was to be allowed in order that all offerors could propose regarding the same RFP (*see* FAR 15.206(a), (d)).

Still not having received a notice of change in the note, on 11 June 2003, ADT submitted its final cost proposal revision which was the lowest priced offer. Had the amount ADT now seeks been added to its offer, it would have been the third lowest offeror (finding 7).

Since ADT's proposal was incorporated into the contract (finding 7) it argues that its assumption/question became a term of the contract, in conflict with the drawing note. A reading of ADT's assumption/question (finding 5) leads to the conclusion that it cannot reasonably be considered a term of the contract. It is a statement that even internally questions whether it is a correct assumption and wonders whether a RFP/contract provision that is clear will be changed. If ADT's statement were a term of the contract, we do not know what it would require or allow. Are we to assume that ADT was free to choose any area of the base to use as a borrow area? The areas it later

suggested to the contracting officer (finding 12) were not existing borrow sites but merely areas of the base that were in close proximity to the construction site. It is true that ADT hoped that its removal of soil from one particular area would leave the site more usable,[6] but the contract contained no terms to deal with the effort. There were no specifications governing how the area would be left, such as what happens if the area contains too much fill and leveling does not occur. We conclude that the assumption/question was just that, and not a term of the contract. Moreover, as we have found, only ADT had actual notice of both its assumption/question and the drawing note.

ADT did not treat it as a term of the contract after award. When unidentified employees of the Corps told ADT in November 2003 that there were no on-base borrow areas (finding 11) ADT made no assertion of a contract right to the contracting officer. It was not until 19 May 2004 (finding 12), that ADT contacted the contracting officer regarding on-base fill. Even then, the letter does not mention that permission to use on-base fill had been denied previously nor assert any contract right to use on-base fill. The letter merely requests that ADT be allowed to use on-base fill. In other words, it is a request that the government change the drawing note. It was not until January or March 2005, that the contracting officer, for the first time, became aware that ADT was asserting a right to use on-base fill (findings 14, 15).

CONCLUSION

The government's refusal to allow ADT to use an on-base site for securing fill for the contract was not a change. The appeal is denied.

Dated: 10 March 2006

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

[6] It is also true that the unidentified employees of the end-user, the Air Force, liked the idea of the area being leveled (finding 9).

(Signatures continued)

I concur

CARROLL C. DICUS, JR.
Administrative Judge
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. 55125, Appeal of ADT Construction Group, Inc., rendered in conformance with the Board's Charter.

Dated:

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