

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
HITT Contracting, Inc.) ASBCA No. 55758
)
Under Contract No. HQ0095-05-D-0003)

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APPEARANCE FOR THE GOVERNMENT: Paul A. Embroski, Esq.
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OPINION BY ADMINISTRATIVE JUDGE PAUL

This is a timely appeal of a contracting officer's (CO) decision denying HITT Contracting, Inc.'s (HITT) appeal in the amount of \$67,892. The Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, is applicable. Only issues of entitlement are before us for decision. Each party filed a motion for summary judgment, and the Board subsequently held an oral argument on the motions. We grant the appellant's motion, deny the respondent's motion, and sustain the appeal.

FACTUAL BACKGROUND¹

1. On 19 November 2004, the Washington Headquarters Services (WHS), Department of Defense (DoD), awarded indefinite delivery/indefinite quantity (IDIQ) Contract No. HQ0095-05-D-0003 to HITT to perform construction and renovation work at the Pentagon on an as needed basis. The base contract encompassed a one-year term, and there were four option years. (R4, tab 1)

2. As awarded, the contract provided that WHS could order supplies and services through the issuance of delivery orders or task orders (R4, tab 1 at 8). The type of work to be ordered could be in the form either of scheduled or non-scheduled line items. Scheduled line items appear in a voluminous document attached to the contract which contained columns of line items, their verbal description, and prices which had been negotiated between the parties. The items on the schedule encompassed numbers 0001

¹ We cite these facts solely for purposes of resolving the cross-motions for summary judgment.

through 0365AD (R4, tab 1, attachment). Non-scheduled line items were governed by § 1.5 of the contract which provided:

1.5.1. Line items that are not on the schedule shall be negotiated between the Contractor and the contract specialist and approved by the Contracting Officer. The items will be shown on the task order as non-scheduled line items and numbered consecutively starting with NS 1.

1.5.2. If a non-scheduled line item specification and price is used three times, and a further need established, the contract shall be modified to have it incorporated as a scheduled line item.

(R4, tab 1 at 19)

3. On 18 July 2006, after negotiations, the CO awarded task order no. 139, under the base contract, to HITT in the amount of \$317,688.64 to renovate a mail handling trailer located at the Pentagon's Remote Delivery Facility. Section 00700 on page 4 of this task order stated: "This is a firm fixed price task/delivery order being issued under an existing contract. All terms and conditions of the basic contract are incorporated and made applicable to this order" (R4, tab 6). Page 6 of task order no. 139 contained a "Summary Sheet For Line Items" which had been prepared by WHS and forwarded to HITT (aff. of Ruth Bodnar ¶ 5). All of the line items contained in the summary sheet are derived from the voluminous schedule which was part of the basic contract. Accordingly, the summary sheet does not contain any non-scheduled line items.

4. As work progressed under task order no. 139, a dispute arose between the parties as to whether HITT was required to install a fire alarm system in the mail handling trailer. It is undisputed that the basic schedule contained a line item - number 16.2 engineering services - which included work such as design of a fire alarm system. Accordingly, the summary sheet for task order no. 139 stated "16.2 Engineering services \$24,198.00." However, there was no schedule line item for the installation of a fire alarm system, and the summary sheet for task order no. 139 did not contain any non-scheduled items. Therefore, the CO did not order the installation of a fire alarm system from HITT as part of this task order (R4, tab 1, attach., R4, tab 6).²

² It is also axiomatic, as HITT points out in its brief, that the contractor could not have provided a bid for the installation of a system which it had not yet designed (app. br. at 1).

5. On 8 August 2006, 21 days after award by the CO of task order no. 139, HITT completed the design of the fire alarm system and submitted it to the Pentagon's Fire Marshall for approval (Bodnar aff. ¶ 16).

6. On 29 August 2006, Renard Mosley, the CO's representative, forwarded an e-mail to HITT in which he requested an "estimate for the above project [task order no. 139] Scope of Work for the additional work required below": "Scope of Work Install Fire Alarm System Including Strobes Horns, and Pull Stations as per Fire Marshals [sic] Request" (emphasis added) (app. R4 supp., tab 6).

7. On 29 August 2006, HITT submitted a proposed modification for installation of the fire alarm system as a non-scheduled item in a total amount of \$67,892 (R4, tab 10 at 6-8). In a meeting held on 31 August 2006, the CO informed HITT's representative, Ms. Ruth Bodnar, that HITT's proposed modification would not be approved because "the changes being requested was [sic] clearly already apart [sic] of the existing task order scope in task order 0139." In response, Ms. Bodnar stated that she would pull "her folks off the job." (R4, tab 11 at 1) Ms. Bodnar reconsidered, and HITT completed installation of the fire alarm system under protest on 7 September 2006 (Bodnar aff. ¶ 26).

8. On 11 September 2006, HITT filed a claim in the amount of \$67,892 for installation of the fire alarm system (R4, tab 13).

9. On 11 December 2006, the CO denied HITT's claim in its entirety (R4, tab 14). This appeal followed (R4, tab 15).

DECISION

Summary judgment is appropriate when there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. *Mingus Constructors, Inc., v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). There are no genuine issues of material fact presented by the parties' motions, and we can resolve this appeal by focusing on the four corners of the contractual documents. Installation of fire alarm systems did not appear in the voluminous schedule which was part of the contract. Therefore, if WHS ordered such an installation, it had to negotiate the resulting line item as non-scheduled work. An analysis of the summary sheet for line items which was prepared by WHS reveals that no non-scheduled line item for installation of a fire alarm system existed. Accordingly, WHS's arguments notwithstanding, such an installation was not part of HITT's scope of work. Thus, HITT is entitled to recover its costs for installing the fire alarm system in the trailer under protest.

CONCLUSION

Appellant's motion for summary judgment is granted, respondent's cross-motion is denied, and the appeal is sustained. The appeal is remanded to the parties for a determination of quantum.

Dated: 16 September 2008

MICHAEL T. PAUL
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. 55758, Appeal of HITT Contracting, Inc., rendered in conformance with the Board's Charter.

Dated:

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