ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
PGDC/Teng Joint Venture	)	ASBCA No. 56573
	)	
Under Contract No. W912HN-06-C-0064	)	

APPEARANCES FOR THE APPELLANT: Timothy R. Conway, Esq.
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OPINION BY ADMINISTRATIVE JUDGE DELMAN
ON GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

The United States Army Corps of Engineers (government) moves for summary judgment in this appeal. The appeal is from the decision of the contracting officer (CO) denying the claim of PGDC/Teng Joint Venture (appellant or Teng) for contract reformation in the amount of $578,567. Appellant opposes summary judgment, contending that there are disputes of material fact on the record. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 27 June 2006, the government issued a firm, fixed-price request for proposal (RFP) for the design and the construction of the Battle Equipment Testing Facility Relocation at Fort Gordon, GA (R4, vol. I, ex. D, attach. 1). This procurement was a § 8(a) set-aside for small business.

2. Section 01010, paragraph 29.7.2 of the RFP provided for new off-site communications ductlines and manholes. Paragraphs 29.7.2.3.2 and 29.7.2.3.3 of the RFP stated that the new ductlines shall be 6-way, 4-inch ducts and shall be concrete

encased. (R4, vol. IIa, attach. 3, 01010-63) These RFP provisions are set out in full below (SOF ¶ 16).

3. Teng submitted a proposal in response to the RFP on 10 July 2006, in the amount of $5,826,486.71. It appears that appellant was the only firm that submitted a proposal. Mr. Ronald W. Chambers, P.E., appellant's operations manager, prepared this proposal as well as appellant's subsequent proposals. (R4, vol. I, ex. B (Chambers aff.), attach. 1)

4. Appellant's first proposal contained no dollar amount for the off-site communications ductlines (Teng Statement of Undisputed Material Facts (SUMF) ¶ 24). By e-mail dated 18 July 2006, Mr. Efrain Rosario, the government's senior project manager, forwarded to Mr. John Samis, appellant's project design engineer, the government's technical review comments for the first proposal. Insofar as pertinent, page 3 provided as follows:

> No site communications drawings were provided showing the location and extent of the new communications ducts, manholes and cabling that shall be required.

(Chambers aff., attach. 4 at 30) Mr. Rosario reiterated this point to Mr. Samis in a communication on 18 July 2006, and advised that a dollar amount for such a system had to be included in appellant's proposal (Chambers aff. ¶ 21).

5. The parties held a conference call on 20 July 2006 to discuss appellant's proposal in greater detail. The government indicated that appellant's price was too high, and the government wanted a "least cost" proposal. The parties discussed possible changes to the scope of work that would reduce cost, but did not specifically discuss any reductions to the new off-site communications ductbank system. (Chambers aff. ¶¶ 18-20, 22)

6. On 26 July 2006, appellant submitted a revised proposal. In response to the government's stated desire for a least cost proposal, appellant included a line item in its revised proposal for an off-site communications ductbank system consisting of a single 4-inch conduit with one 48-strand fiber, rather than the 6-way, 4-inch conduit encased in concrete as stated in the RFP. (Chambers aff. ¶¶ 24, 25) This was a deviation from that specified in the RFP. Appellant's revised proposal did not describe in narrative form the substance of this work, nor did it identify the RFP provision to which it related. Rather, appellant inserted a line item in its revised proposal in "Division No. 16 Electrical," indicating "Conduit 4"C UG to manhole," along with the date "7/25" in the amount of $140,000. (Chambers aff. attach. 2 at 7) The revised proposal in no other way indicated

that this item was a reduction in the scope of the work or a deviation from that set forth in the RFP.

7. According to appellant, the cost of the multi-conduit, concrete encased ductline system prescribed by the RFP was approximately $650,000, much greater than its $140,000 proposal. The cost was over 60 percent of appellant's $1,075,979.10 proposal for all Division 16 electrical work. (Chambers aff. ¶¶ 32, 34)

8. On 3 August 2006, the parties discussed appellant's revised proposal by conference call. Appellant's proposed ductline was not specifically addressed by either party at this time. Appellant considered this item accepted by the government "because the cost of a six-conduit system would have been obviously greater and because both the Corps and PGDC/Teng were working toward a 'least cost' project." (Chambers aff. ¶ 40)

9. Appellant submitted a final proposal in the amount of $5,700,000 on 4 August 2006. The final proposal included the same proposal for the reduced-scope ductbank system as found in appellant's revised proposal. (Chambers aff., attach. 3 at 6) The government awarded Contract No. W912HN-06-C-0064 to Teng on 31 August 2006, in the amount of $5,700,000 (R4, vol. III, attach. 8). At no time did appellant expressly obtain the approval of the contracting officer for this RFP deviation. The contract states that the contractor is responsible for obtaining such an approval. See 52.236-4001(b)(2) and section 01010, ¶ 7 set out below (SOF ¶ 16).

10. During contract performance, a dispute arose over the off-site communications ductbank requirements of the contract. The government was of the view that the contract required a 6-way concrete encased ductbank system; appellant was of the view that it had proposed, and the government had accepted its single, 4-inch conduit. However, the specifications and drawings issued for construction by appellant were consistent with the government's position (gov't reply, attach. 6 at 15; attach. 7 at 2). The government directed appellant to perform in accordance with the government's interpretation, and it appears that appellant did so under protest.

11. On 17 September 2007, appellant submitted a certified claim to the CO in the amount of $578,567 to install the 6-way concrete encased ductbank system. Teng asserted a "clerical error between scope of work [appellant] priced and agreed to perform....the description of work contained in [appellant's] statement of work, and the RFP" (R4, vol. I, ex. A at 1). Teng argued that the contract should be modified or reformed to correct the mistake that had been made.

12. After correspondence between the parties, appellant submitted supplemental information for the claim on 25 February 2008. Appellant asserted theories of unilateral

mistake, mutual mistake and a breach of the government's duty to disclose superior knowledge. (R4, vol. I, ex. B)

13. The CO issued a decision on 30 June 2008 denying the claim (R4, vol. I, untabbed). This appeal followed.

14. Prior to award, a government estimator, Mr. Patrick Vaidya, prepared Current Working Estimates (CWEs) for the project (SUMF ¶ 7). The estimator did not include any pricing for the subject off-site communications ductbanks in the CWEs (*id.* ¶ 12). Mr. Vaidya also prepared the Independent Government Estimate (IGE) for the project on 12 July 2006 after the RFP had been finalized. Mr. Vaidya did not use the final and complete version of the RFP when he prepared the IGE. Consequently, the IGE also did not include any estimate or pricing for the subject off-site communications ductbanks. (*Id.* ¶¶ 16-18, 20)

15. Prior to award, the government prepared a price negotiation memorandum (PNM). In ¶ 7 of the PNM, "Bid Item No. 2: Battle Laboratory Facility incl. all Supporting Facilities, complete," the PNM set out in a table, by column, and per Division of work, the "Contractor's Proposal," "IGE Adjusted," "Objective" and "Negotiated". The table did not specifically address the subject ductbank system. The PNM also did not specifically address the subject duct system in its narrative discussion of the Division 16 work. The PNM indicated in ¶ 6 that the IGE had been revised "to reflect a better understanding of the requirements of this contract" and that the revisions were made "after reviewing the original IGE for clarity after negotiations with the Contractor" (R4, vol. III, attach. 7 at 1). However, the PNM did not state how the IGE was revised and whether any such revision included an estimate for the subject ductbank system. The revised IGE is not of record.

16. We find the following contract provisions pertinent to the subject motion:

> 52.236-4001 DESIGN-BUILD CONTRACT-ORDER OF PRECEDENCE – Nov 2004
>
> (a) The contract includes the standard contract clauses and schedules current at the time of award. It also entails:
>
> (1) the solicitation in its entirety, including all drawings, cuts and illustrations, and any amendments during proposal evaluation and selection, and (2) *the successful Offeror's accepted proposal in its entirety, including all drawings, catalog cuts, illustrations, personnel, narratives and other offers that meet or exceed the RFP requirements.* The contract

constitutes and defines the entire agreement between the Contractor and the Government. No documentation shall be omitted which in any ways bears upon the terms of that agreement.

(b) In the event of conflict or inconsistency between any of the provisions of the various portions of this contract, precedence shall be given in the following order:

(1) Items which exceed the RFP requirements

....

(2) The provisions of the solicitation. (see also Contract Clause: SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION.) *If the proposal, or any approved design submission, offers to provide any requirement that does not meet the RFP specification and drawings, and that item is not specifically recognized during evaluation as a proposal weakness, it is a deviation. Deviations from the minimum standard of quality required by the RFP shall not be accepted unless identified and specifically approved by the Contracting Officer in writing. If unapproved, the Contractor must provide the RFP requirements without additional cost to the Government.*

(3) All other provisions of the accepted proposal.

(4) Any design products, including but not limited to plans, specifications, engineering studies and analyses, shop drawings, equipment installation drawings, etc. These are "deliverables" under the contract and are not part of the contract itself. Design products must conform to all provisions of the contract, in the order of precedence herein. (End of Clause)

52.236-4003 RESPONSIBILITY OF THE CONTRACTOR FOR DESIGN – OCT 2004

(a) The Contractor shall be responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other non-construction

> services furnished by the Contractor under this contract. *The Contractor shall, without additional compensation, correct or revise any errors or deficiency in its designs,* drawings, specifications, and other non-construction services and perform any necessary rework or modifications, including any damage to real or personal property, resulting from the design error or omission.

(R4, vol. IIa, attach. 3 at 138-39 of 146) (Emphasis added)

SECTION 01010

GENERAL PROJECT DESCRIPTION AND DESIGN REQUIREMENTS

> ....
>
> 7. RFP DESIGN AND TECHNICAL CRITERIA
>
> *All designs and construction document drawings and specifications shall be prepared to comply with the RFP. The RFP describes the design work that shall not be changed, and shall be included in the construction documents. All remaining design work shall be performed by the Contractor based on the design criteria as required by the RFP. No deviations from the criteria will be allowed unless prior approval is obtained from the Contracting Officer's Representative.* All questions or problems encountered by the Contractor in following criteria shall be promptly submitted with recommendations to the Contracting Officer's Representative for approval.

(R4, vol. IIa, attach. 3, 01010-4) (Emphasis added)

> 29. SITE ELECTRICAL DESIGN
>
> ....
>
> 29.7 Site Communications
>
> ....

29.7.2 Ductlines:

29.7.2.1 The new building service ductline system shall consist of a new ductlines and manholes from the new building to the existing manholes and ductlines to the existing Communications Building #15301 as indicated on the site communications plans, Plates ES-02 and ES-03. New ductlines with manholes shall be provided for the following manholes: MH-N25, MH-25, MH-N26, MH-N27, MH-N28, MH-N28-1, MH-N28-4, MH-N28-5, and the new manholes provided under this contract from the northwest corner of the intersection of 13th Avenue and 19th Street to the new building communications room. MH-25 is existing, but new ductlines shall be provided through this manhole.

....

29.7.2.3 New ductlines shall be as follows:

....

29.7.2.3.2 *New ductlines between manholes shall be 6-way 4-inch ducts.*

29.7.2.3.3 *New ductlines shall be concrete encased.* Multi row ductlines shall utilize spacers. All ductline bends up through concrete slabs shall be Galvanized Rigid Steel (GRS). Ducts installed (Jack & Bore or directional bore) under existing roads shall be direct buried rigid galvanized steel.

(R4, vol. IIa, attach. 3, 01010-58, -63)(Emphasis added)

PRELIMINARY MATTERS

In its opposition papers, Teng objects to the government's assertion of additional, undisputed facts in the government's reply brief to support its motion for summary judgment. We agree with appellant that this is not standard practice, but Teng was given the opportunity to reply, and did in fact reply to each of the government's new assertions. Appellant has not shown any material prejudice, and we overrule this objection.

Teng also contends in its opposition papers that all the facts asserted in its own "Statement of Undisputed Material Facts" (SUMF) dated 16 July 2009 must be taken as true since the government failed to respond to them in its reply. However, many of appellant's factual assertions are argumentative and/or contain legal conclusions (*e.g.*, nos. 5, 26, 29, 33, 40, 43, 44, 45, 46). Other factual assertions are immaterial to the government's motion (*e.g.*, nos. 1, 2, 6). Appellant also cites no legal basis for its position. Accordingly, we deny appellant's request to accept as true its SUMF except as otherwise cited herein.

Finally, appellant has objected to a number of the documents in the Rule 4 file as supplemented: Contracting Officer's Statement (R4, vol. I, ex. C); Office of Counsel's Statement (R4, vol. I, ex. D); the IGE dated 12 July 2006 (R4, vol. I, ex. D, attach. 2); and the RFP specifications as modified after award (R4, vol. IIa, attach. 3, vol. IIb, attach. 4). As for the latter objection, appellant contends that the post-award set of specifications was not identical to the pre-bid set. However we find that the provisions cited herein were identical in both sets, and to this extent appellant's objection is overruled. Appellant's other objections are moot. To the extent these Rule 4 documents are cited herein, they are cited only for material facts that are undisputed by the parties.

DECISION

Summary judgment is properly granted when the moving party has established that there are no genuine issues of material fact and it is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one that may make a difference in the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Whether such disputed material facts exist must be viewed in a light most favorable to the nonmoving party with doubts resolved in its favor. *Gart v. Logitech, Inc.*, 254 F.3d 1334, 1339 (Fed. Cir. 2001). Summary judgment may be properly granted to a party when the nonmoving party fails to offer evidence on an element essential to its case and on which it bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

Upon due consideration of these principles, we conclude that there are no genuine issues of material fact, and that the government is entitled to judgment as a matter of law for reasons stated below.

I. Breach of Duty to Disclose Superior Knowledge

Appellant contends that it is entitled to reformation of the contract price because the government breached its duty to disclose superior knowledge to appellant prior to award. In order for a contractor to show a government breach of its implied duty to

disclose superior knowledge, it must satisfy the four-part test set forth in *Giesler v. United States*, 232 F.3d 864, 876 (Fed. Cir. 2000):

> (1) a contractor undertook to perform without vital knowledge of a fact that affects performance costs or duration; (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information; (3) any contract specification supplied [by the Government] misled the contractor or did not put it on notice to inquire; and (4) the government failed to provide the relevant information.

Appellant contends the government had superior knowledge of the government's future needs with respect to the project in general and the disputed work in particular but failed to share such information with appellant (Teng memo. of law at 13). However, appellant fails to support these broad contentions with any evidence of specific, relevant information or vital knowledge unavailable to appellant that the government possessed but failed to share with appellant prior to award. Appellant also fails to provide evidence of how the contract specifications misled appellant or did not put it on notice to inquire.

Accordingly, we conclude that appellant has failed to provide evidence to support the elements necessary to prove its case that the government breached its duty to disclose superior knowledge. It follows that the government is entitled to prevail on this issue as a matter of law, and we grant the government's motion for summary judgment.

II. <u>Reformation Based Upon Mutual Mistake</u>

Appellant also contends that it is entitled to reformation of the contract price on the grounds of mutual mistake. According to appellant "the Contract should be reformed to reflect *the actual agreement of the parties* to use a single conduit, and PGDC/Teng should be compensated for the additional costs of the six-conduit system ultimately required by the Corps of Engineers" (Chambers aff. ¶ 55) (emphasis added). Appellant also contends that the parties' failure to document their agreement entitles it to relief.

We agree with appellant that a contract may be reformed to reflect the actual agreement of the parties. As stated by the Court in *National Australia Bank v. United States,* 452 F.3d 1321, 1329 (Fed. Cir. 2006):

> Reformation of a written agreement on the ground of mutual mistake is an extraordinary remedy, and is available only upon presentation of satisfactory proof of four elements:

> (1) the parties to the contract were mistaken in their belief regarding a fact;
>
> (2) that mistaken belief constituted a basic assumption underlying the contract;
>
> (3) the mistake had a material effect on the bargain; and
>
> (4) the contract did not put the risk of the mistake on the party seeking reformation.
>
> *Atlas Corp. v. United States*, 895 F.2d 745, 750 (Fed. Cir. 1990)(footnote omitted). An erroneous mutual belief about the contents of a written agreement is sufficient to constitute a "mistake" for this purpose: reformation is available "'when the parties, having reached an agreement and having attempted to reduce it to writing, fail to express it correctly in the writing.'" *Indiana Ins. Co. v. Pana Cmty. Unit Sch. Dist. No. 8,* 314 F.3d 895, 903-04 (7th Cir. 2003) (quoting Restatement (Second) of Contracts, § 155, cmt. a (1981)); *see also Philipine* [sic] *Sugar Estates Dev. Co. v. Gov't of Philipine* [sic] *Islands,* 247 U.S. 385, 389, 38 S.Ct. 513, 62 L.Ed. 1177 (1918) (noting that "[i]t is well settled that courts of equity will reform a written contract where, owing to mutual mistake, the language used therein did not fully or accurately express the agreement and intention of the parties,"....

Accord Atlas Corp. v. United States, 895 F.2d 745, 750 (Fed. Cir. 1990), where the Court stated as follows:

> Reformation serves to bring the parties' written contract in accord with their agreement. Professor Corbin states:
>
>> Reformation is not a proper remedy for the enforcement of terms to which the defendant never assented; it is a remedy the purpose of which is to make a mistaken writing conform to *antecedent expressions on which the parties agreed....* The written document was intended to be no more than the integration in writing of the terms already

> agreed upon. In so far as it differs from those terms it is mistaken and will be corrected.

3 *Corbin on Contracts* § 614 at 723 (1960). He emphasizes that "a court will not decree reformation unless it has convincing evidence that *the parties expressed agreement and an intention to be bound in accordance with the terms that the court is asked to establish and enforce*." *Id.* at 725. [Emphasis added]

The contract required that appellant's work comply with RFP requirements. Insofar as pertinent, appellant's proposal deviated from RFP requirements. Under 52.236-4001(b)(2) such a deviation shall not be accepted unless identified and specifically approved by the contracting officer in writing. It is undisputed that the contracting officer did not affirmatively approve appellant's deviation. Thus, appellant has not shown that the government agreed to, and intended to be bound by appellant's deviation.

Having failed to provide any evidence of an agreement of the parties that was not reflected in the contract documents, appellant has failed to provide evidence of an element necessary to prove its case of mutual mistake. Accordingly, we grant the government's motion for summary judgment on this issue. *See Promac, Inc. v. West*, 203 F.3d 786 (Fed. Cir. 2000); *Dairyland Power Co-Op. v. United States*, 16 F.3d 1197 (Fed. Cir. 1994); *Int'l Oil Trade Center*, ASBCA No. 55377, 08-2 BCA ¶ 33,916.

III. Reformation Based Upon Unilateral Mistake

Lastly, appellant contends that it is entitled to reformation of the contract price on the grounds of unilateral mistake. The law of unilateral mistake is well settled. The Federal Circuit in *McClure Electrical Constructors, Inc. v. Dalton*, 132 F.3d 709, 711 (Fed. Cir. 1997), set out the contractor's burden of proof as follows:

> The contractor must show by clear and convincing evidence that:
>
> > (1) a mistake in fact occurred prior to contract award; (2) the mistake was a clear-cut, clerical or mathematical error or a misreading of the specifications and not a judgmental error; (3) prior to award the Government knew, or should have known, that a mistake had been made and, therefore, should have requested bid verification;

(4) the Government did not request bid verification
or its request for bid verification was inadequate;
and (5) proof of the intended bid is established.

We see no evidence to support appellant's allegation that it misread the RFP provisions for the off-site communications ductbank system. Indeed, appellant concedes in its papers that it was fully aware of the required 6-way, concrete-encased duct system prior to award: "Teng carefully read the specifications, and Teng knew of the original off-site communications ductbank requirements" (app. reply br. at 10). Notwithstanding, appellant knowingly and intentionally proposed a reduced scope of work and a reduced price in an attempt to provide a least cost project. In so doing, appellant assumed that the government had no present desire or need for the RFP requirement and would agree to the reduced scope of work at the reduced price. This was a business judgment. In essence, appellant substituted its own judgment for that clearly specified in the RFP. Appellant's poor judgment was compounded by its poor judgment in failing to expressly notify the government of this RFP deviation and failing to seek and obtain the government's approval of the same as required by the RFP (SOF ¶ 16). Reformation of contract price is not available for judgmental error. *McClure*, 132 F.3d at 711.

Appellant argues forcefully, and offers evidence to show that the government's internal estimating practices on this project, and for the CWEs and the IGE in particular, were faulty, which impacted the government's ability to evaluate appellant's proposal. However, whether more accurate versions of these documents would have caused the contracting officer to question and to seek verification of the disputed line item in appellant's proposal prior to award is mere speculation. In any event, for appellant to make a *prima facie* case, it must adduce evidence that it made a mistake that was subject to remediation under the law. Appellant has failed to offer any such evidence. Appellant did not misread the RFP and has not shown any other legally recognized mistake (*see* below).

We need not address any other theories of unilateral mistake, *i.e.*, clear-cut clerical or math error, since appellant does not assert any such errors in its papers before us: "The mistake...[was] not a clerical or mathematical error" (7/16/09 memo. of law at 7); "The mistake...[was] not a clerical or mathematical error" (8/31/09 reply br. at 11)). Also, appellant does not assert any such errors in its complaint. To the extent appellant's claim before the CO asserted such errors, we deem them abandoned on appeal to the Board.[1]

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[1] In any event, appellant fails to provide any evidence of a pricing error that would be considered a clear-cut clerical mistake or math error. *E.g.*, FAR 14.407-2. *See* CIBNIC & NASH, FORMATION OF GOVERNMENT CONTRACTS at 655 (3d ed. 1998) (gathering cases).

Having concluded that appellant has failed to show any evidence of a unilateral mistake subject to reformation, we need not address the other prongs of the *McClure* test set out above. Appellant has failed to offer evidence to support an element essential to its case of unilateral mistake, and the government is entitled to prevail as a matter of law. We grant summary judgment to the government on this issue.

CONCLUSION

For the reasons stated, the government's motion for summary judgment is granted. The appeal is denied.[2]

Dated: 22 April 2010

JACK DELMAN
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. 56573, Appeal of PGDC/Teng Joint Venture, rendered in conformance with the Board's Charter.

[2] Appellant's claim dated 17 September 2007, as revised, also sought a contract price adjustment under 48 C.F.R. § 50.302-2, pursuant to Pub. L. No. 85-804. Appellant failed to assert this cause of action in its complaint, and we deem the matter abandoned on appeal.

Dated:

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