

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
R.L. McDonnell Construction) ASBCA No. 56262
)
Under Contract No. W912GY-06-C-0003)

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OPINION BY ADMINISTRATIVE JUDGE DICKINSON

This appeal arises from a contract to provide and install endwalls for two existing Butler-Style buildings at Sierra Army Depot in Herlong, California. R.L. McDonnell Construction (appellant or "RLMC") seeks compensation in the amount of \$48,447.00 for additional costs it claims to have incurred related to the concrete footings for the endwalls. We have jurisdiction under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. Only entitlement is before us.

FINDINGS OF FACT

1. Sierra Army Depot in Herlong, California, is located in a remote desert area in the foothills of the Sierra Nevada mountains (tr. 1/23, 25, 204-05, 2/40). Prior to the contract at issue in this appeal RLMC had completed over 400 government construction contracts, including five other fixed-price contracts at the Sierra Army Depot. At the time of the hearing, RLMC's owner, Robert L. McDonnell, was a licensed general engineering contractor and had been in the construction business for over 40 years. (Tr. 1/31-35, 103-04, 204-05)

2. Buildings 214 and 215 at Sierra Army Depot were pre-engineered Butler-Style¹ buildings, each of which had roofs and steel support side columns, but no sidewalls or

¹ Butler is a particular manufacturer of pre-engineered metal buildings (tr. 1/154-55). The term "Butler-Style" in the SOW referred to the shape of the buildings as commonly understood in the industry (tr. 2/74-75, 89-90).

endwalls, and each was flanked by existing fully-enclosed buildings (R4, tab 2; app. supp. R4, tab 9). Buildings 214 and 215 are used to refurbish equipment that is brought from Iraq to Sierra Army Depot and then sent back to Iraq (tr. 1/25). RLMC installed radiant heaters in Buildings 214 and 215 under an earlier contract (tr. 1/34-35, 121, 204, 2/9-10). Mr. Robert W. Gee, Jr., the engineer at Sierra Army Depot tasked with drafting the Statement of Work (SOW) and drawings for the project at issue (tr. 2/6, 8-9), described the need for adding endwalls to Buildings 214 and 215:

The buildings [were] long and narrow and the wind zips right through the buildings and negates the heat value that we're trying to dry paint with, so putting on end walls would capture the heat [by] retaining it in the building.

(Tr. 2/44)

3. In February 2006, according to Mr. McDonnell:

I was at Bob Gees [sic] office discussing matters pertaining to the Radiant Heater project I was working on at the time, when he ask[ed] for my opinion on a cost estimate for End Walls at bldg. 210 [sic] & 215. He had been working on the estimate as it was displayed on his monitor.

He sketched out on the back of my envelope what was planed [sic]. (Exh. A) We went thru [sic] each cost item and came up with \$119,632.50. He said the total price had to be under \$100,000.00, so we added 8% for overhead and profit for two walls to bring the price below \$100,000.00.

He gave me [a] print out of the estimate (Exh. B) and told me the job would go out for competitive bid.

(R4, tab 24; tr. 1/35-43, 107-09) Mr. Gee agreed he was "trying to pick [Mr. McDonnell's] brain on determining costs for this project" (tr. 2/9).

Q And what was your purpose of having this conversation with Mr. McDonnell?

A I was trying to determine current pricing for Sierra Army Depot. It's out in the middle of the desert. Things cost more out there to haul it in from Reno or from Sacramento. He's a local contractor that would be privy to some of that detail that I needed to establish a budget for this project.

(Tr. 2/39-40; *see also* tr. 2/52-54 (because of remote location the Means guide is not an appropriate source for cost information)) During the half-hour discussion (tr. 1/61, 109, 2/39), Mr. Gee sketched out “doodlings of a foundation” (tr. 2/10, 42, 57-58 (vertical lines were to indicate siding, not columns)), and included the handwritten words “ENGR UPLIFT & LATERIAL [sic] FORCES CONCRETE” (R4, tab 24), in the upper right corner:

Q What did you mean by those words?

A We were talking – I wanted to make sure that he got an engineer to check uplift and lateral forces and the concrete before he bids.

Q And why was that?

A Well, if he relied on my numbers, I could be dead wrong. And the contractor is responsible for the concrete design.

....

Q What is...“ENGR uplift.” What did you mean by that specific –

A Have an engineer check uplift. It’s a long narrow building with two roll-up doors. If one door is down and the other one up, wind can go in and that entire building act like a parachute, wants to fly away. That’s what’s called uplift.

Q Now, from this drawing, could you – did this – could he have used this drawing to check the uplift?

A No. No.

Q What would he have required to check the uplift?

A The foundations of the existing framework of the building.

....

Q Now, you said that if he had...the concrete footings of existing buildings, is this something that he could have measured out himself?

A Sure.

Q And how could he have measured this out himself?

A Well, with the footings, you just take a tape measure and get the area and you have to dig down to find where that concrete foundation ends.

(Tr. 2/40-43) Mr. Gee testified that, in order to get footing depth information prior to bid, he believed the government would have accommodated a bidder's request to saw-cut and dig at one of the footings (tr. 2/55-56, 58-59, 61). Mr. McDonnell admitted he could have measured the existing footing dimensions on the surface, but not the depth (tr. 1/121-22), and that neither he nor his subcontractor NVBS (*see* finding 8) took any such measurements, nor did they attempt to obtain the depth measurements from the government or by any other means prior to submitting their bids (tr. 1/124; *see also* findings 20, 21).

4. Buildings 214 and 215 had been built at some time prior to February 2006 to identical specifications, of which three structural drawings dated 10 April 1997 ("1997 drawing(s)") and associated with Building 214 and 215 footings/foundations are contained in the record. Building numbers 214 and 215 were not referenced in the 1997 drawings because new buildings were not numbered until after they were completed. Building 214 was constructed between enclosed and already-existing Buildings 208 and 209 and Building 215 was constructed between enclosed and already-existing Buildings 209 and 210. The only references to building numbers in the three 1997 drawings were to Buildings 208, 209 and 210, identifying them as the existing buildings between which the buildings, later numbered as Buildings 214 and 215, were to be constructed. (Tr. 2/72, 80-83, 91-93, 95; supp. R4, tab 30 (Drawings S-1, S-2, S-3); app. supp. R4, tab 9 at 2) Mr. Gee testified that, as a result of his personal knowledge of the Sierra Army Depot, his onsite investigation and details in the 1997 drawings, he understood these three drawings to be part of the original engineering drawings for Buildings 214 and 215. He used these three drawings, together with other information he gathered, in his preparation of the SOW and drawings for the endwall project which is the subject of the appeal now before us (tr. 2/82-86). Mr. Gee copied the "TYPICAL SECTION" of 1997 drawing S-2 as the basis for the two drawings included in the 2006 SOW contained in the contract now before us (tr. 2/70-76, 83-84). The "FOUNDATION PLAN" portion of 1997 drawing S-2 which showed the surface location and size of then-existing footings along the sides of Buildings 214 and 215, but not the depth of the existing footings, was

not incorporated into the 2006 SOW (tr. 2/76-79, 86-88). The 1997 drawing S-3 included the "TYPICAL FOOTING DETAIL" which showed the dimensions of the footings for the existing Buildings 214 and 215 to be 8 feet by 9 feet by 2 feet, 10 inches deep. Mr. Gee also did not include this information in the 2006 SOW (tr. 2/78, 87-88). We find that the information contained in the 1997 drawings which was pertinent to then-existing above-surface details of Buildings 214 and 215 at the time of the solicitation now at issue was open to observation and visual inspection, with the exception of the depth of the footings for the existing steel support side columns. The 1997 drawings in the record do not contain any manufacturer information pertaining to Buildings 214 and 215.

5. Mr. Gee testified that in collecting information for the drawings to be included in the SOW for the endwall project, he took his hand drawn sketch (finding 3), "made a copy and then doctored it up. I found a Butler-Style building and started from there making notes." (Tr. 2/30; see finding 4) While he noticed minor differences from his original draft, Mr. Gee believed the final 2006 SOW to be 90-99% his work (tr. 2/19-25).

Q When you created your version of the statement of work, which we just discussed was largely incorporated into this statement of work, did you anticipate that the end walls to be attached to the existing structure would use the existing building for structural support or did you believe that the end walls to be attached to the existing structure would be designed and built as free-standing?

A My intent was exactly to leave it up to the contractor. If you want me to interpret it, it's – intuitively to me, it seems reasonable to attach it to the building.

Q So at the time you created the statement of work, did you also feel it was reasonable to attach it to the building?

A Intuitively, it seems cheaper.

....

A Intuitively, it seems reasonable to attach it to the building versus free-standing. But once again, on number ten on page 52 [of the Statement of Work], "The contractor shall be responsible for the structural steel design and layout." I leave it up to the contractor to make that call. All I want to do is retain heat into the building.

(Tr. 2/27-28, 29, 45-46) With respect to "attachment" and what is shown on the drawings in the Solicitation, Mr. Gee testified:

Whether attached with flashing, is it structural? It doesn't show that. It will touch. I just don't know with what. It's a detail that I wanted to leave up to a contractor.

(Tr. 2/31) He agreed that whether attached to one another or not, the drawings show "contact" between the roof structure and the vertical columns to be installed to support the endwalls (tr. 2/35, 48-49).

Q But was being structurally attached, the columns being structurally attached to the existing Butler-Style buildings, was...it your intent to make that a requirement of the contract?

A No. I left it up to the contractor to determine that part and that's why I wrote number 10 there [on page 52 of the Statement of Work].

(Tr. 2/49)

6. Mr. Gee incorporated information from the February 2006 discussion (finding 3), with all the other information he had gathered to arrive at a "rough" price estimate (tr. 2/9-19, 41; R4, tab 24 at 4).

Q After the meeting with [RLMC]..., what was your further involvement in the project?

A I entered it into the computer system.

Q And did you create the statement of work?

A Yes, originally.

Q When you say "originally," what do you mean?

A I enter it into a computer and then it goes to another person. They check it and basically dot the i's and cross the t's and it goes to a third person for approval, then a fourth, and so forth. It can make a loop and come back to me or it may continue on. About that time, I left.

(Tr. 2/19) Mr. Gee left Sierra Army Depot for another job in May 2006 (tr. 2/7-9, 38). A solicitation was subsequently issued and RLMC attended a pre-bid site visit for that solicitation on 13 June 2006; this first solicitation was later cancelled (supp. R4, tab 28; app. supp. R4, tab 4; tr. 1/43-44, 54-56, 102-03).

7. On 16 August 2006 the Army issued Solicitation No. W912GY-06-B-0003 to obtain endwalls for existing Buildings 214 and 215. For each building the successful bidder was to “[c]onstruct two (2) end walls and two (2) personnel doors to an existing ‘Butler Style’ metal building...in accordance with the [SOW]” as well as provide pricing for the possible installation of two roll-up doors for each building (R4, tab 1 at 3-4). This Solicitation included the same SOW that had been included in the earlier canceled solicitation (tr. 1/46-48). The Solicitation did not include any of the handwritten information prepared or discussed by Mr. Gee in February 2006 (*see* finding 3). The Solicitation included in full text:

UNAUTHORIZED INSTRUCTIONS FROM
GOVERNMENT PERSONNEL

(a) The Contractor will not accept any instructions issued by any person employed by the U.S. Government or otherwise, other than the Contracting Officer, or the Contracting Officer’s Representative (COR) acting within the limits of his authority. Contracting Officer’s Representative will be so designated in writing to the Contractor, and the scope of his authority will be set forth therein.

(b) No information other than that which may be contained in an authorized amendment to this purchase instrument duly issued by the Contracting Officer which may be received from any other person employed by the U.S. Government or otherwise will be considered as grounds for deviation from any stipulation of this purchase instrument, referenced drawings and/or specifications.

(R4, tab 1 at 21) Mr. Gee was neither the contracting officer (CO) nor the COR. Thus, we find that the Solicitation expressly put Mr. McDonnell and RLMC on notice that they were not to consider in the preparation of RLMC’s bid any information obtained from Mr. Gee or any other government personnel which was not included within the Solicitation. Mr. McDonnell testified that he read the entire Solicitation before preparing and submitting RLMC’s bid (tr. 123-24).

8. Around the time of the original canceled solicitation (finding 6), RLMC identified a subcontractor to perform the endwall construction work based on “verbal

discussion.” North Valley Building Systems (NVBS) specialized in Butler-Style buildings. After receipt of the second Solicitation RLMC provided NVBS with the SOW and two drawings included in the Solicitation. Consistent with the Solicitation’s express terms about information not contained in the Solicitation (finding 7), there is no evidence that RLMC provided to NVBS any of Mr. Gee’s handwritten information from February 2006. At some unidentified time before RLMC submitted its bid to the government, NVBS requested from RLMC the manufacturer and model number of the existing buildings. (Tr. 1/138-41, 147, 148-49, 152-53) Mr. McDonnell testified:

But it didn’t prevent him [NVBS] from providing a bid for the job because he had enough knowledge to understand the scope of work. But if we ended up getting the job, he would – we would definitely need all that information before anything could be ordered.

(Tr. 1/150) There is no evidence that RLMC or NVBS performed any independent research or investigation to ascertain manufacturer information prior to submitting their bids. Both RLMC and NVBS maintain that they based their respective bids on their assumption that they would install pre-engineered endwalls, however, there are no bid papers nor other evidence in the record to show how they were allegedly able to price pre-engineered endwalls without knowing any of the manufacturer information. In fact, all the evidence shows that in the absence of manufacturer information, they were obligated to assume the need for heavier footings/foundations (findings 20, 21).

9. The Solicitation’s SOW provided the following details for Building 214:

1.1.1 **General:** The contractor shall provide all labor, materials, equipment, supervision and engineering necessary to furnish and install (2) end walls to a “Butler Style” building that spans approximately 61 ft, approximately 20 ft eve, 5 to 12 sloped gable roof, complete with framing for (2) motorized roll-up doors (See Paragraph 1.2 for roll-up doors, Option Line Item 0004) and (2) personnel doors. Existing grade is covered with asphalt and varies in slope. See photographs of existing end walls.

1.1.2 **Background:**

1. Building Classification: Single span rigid frame, General Use.
2. Snow Loads: 40 psf Importance Factor 1.000
3. Wind Loads: 90 mph, Exp-C, Importance Factor 1.000

4. Seismic Zone: 3, Importance Factor 1.000
5. Soil loads: 1500 psf

1.1.3 **Execution:**

1. *The contractor shall verify all field dimensions prior to start [of] construction.*
2. Structural design loads for building is based on ANSI/ASCE 7-88, minimum design loads for buildings.
-
6. The contractor shall size sheet metal panels and fasteners to withstand dead and/or live loads as described in section 1.1.2
7. The contractor shall size all anchors or embedded steel to withstand dead and/or live loads as described in section 1.1.2
-
9. *The contractor shall be responsible for foundation design and anchor bolts.*
10. *The contractor shall be responsible for structural steel design and layout.*
11. Metal siding shall extend past columns to approximately 7 feet to adjacent buildings. See sketch dated 3/14/06.

(R4, tab 1 at 51-52; tr. 2/43-47, 54-56) (Emphasis added) The SOW provided the identical information for Building 215 but with different section numbering (R4, tab 1 at 55-56). Mr. Gee testified that the information he included in § 1.1.2 was the “engineering information” for existing Buildings 214 and 215 “to design [the endwalls] by” (tr. 2/46-47, 73-74). We find that the SOW contained performance specifications pursuant to which RLMC was responsible to design the structural steel and layout, as well as the concrete footings/foundations, for the new endwalls and then to construct the endwalls in accordance with its own design.

10. The 2006 Solicitation included two drawings which indicated general dimensions and location of existing and new structural elements from both the north and south elevations of the existing Butler-Style buildings. Both drawings showed the relative location of the existing enclosed buildings on either side of the Butler-Style Buildings 214 and 215. They also showed the dimensions and relative location of the

existing roof, structural side columns and surface of the footings for the existing side columns of the Buildings 214 and 215, as well as the new walls, structural supports and doors to be installed under the contract. Both drawings stated that "METAL SIDING TO EXTEND PAST COLUMNS" by seven (7) feet toward the existing enclosed buildings on either side. The drawings did not show nor give any dimensions or location for concrete footings to support the new endwalls, as the design of the new footings was the responsibility of the successful bidder under the express terms of the Solicitation (*see* finding 9). Mr. McDonnell acknowledged that the SOW and drawings made no representation as to whether the new endwalls were to be attached to the existing structure or not (finding 12), and we so find. (R4, tab 1 at 62-63) Amendment 1 to the Solicitation added photos from the north and south elevations. The photos showed that the existing roofs of the Buildings 214 and 215 were supported by steel girders and 14 pairs of side columns, for each of which there was an obvious concrete foundation/footing where the steel columns met the asphalt pavement. (R4, tab 2) The Solicitation did not include any information about the manufacturer of the existing Butler-Style buildings and did not indicate that any additional information was available or would be provided.

11. The Solicitation gave notice of a site visit to be conducted on 24 August 2006 and specified the time and location from which the site visit would proceed (R4, tab 1 at 7, 59). The Solicitation also contained the following with respect to a pre-bid examination of the work site:

STATEMENT OF INSPECTION

Bidder shall carefully examine the specifications and drawings, visit the installation where the work is to be performed, and thoroughly acquaint himself/herself with all conditions and matters which can in any way affect the work or the cost thereof. Should the bidder find discrepancies in, or omissions from the specifications or other documents, or should he/she be in doubt as to their meaning, he/she should at once notify the Contracting Officer and obtain clarification prior to submitting a bid.

The bidder shall sign the following statement of inspection if he/she attended the site showing. This applies to all bidders even though a bidder is presently performing a similar contract at the same location.

STATEMENT OF INSPECTION AT SITE OF INSPECTION

I, the undersigned have inspected the site of work and have reviewed the specifications, drawings and/or plans pertaining to the work to be performed.

BIDDER (firm) _____
BY _____
DATE _____

(R4, tab 1 at 15) RLMC's bid included Mr. McDonnell's signature dated 31 August 2006 on the "STATEMENT OF INSPECTION AT SITE OF INSPECTION" form (R4, tab 4 at 15; tr. 1/52, 111-12, 125).

12. RLMC did not seek any clarification or other information prior to submitting its bid (R4, tab 4; tr. 1/110-12). Mr. McDonnell testified he had no contact with anyone at Sierra Army Depot about the endwalls project between his site visit on 13 June 2006 under the first canceled solicitation and the submission of his bid under the second solicitation on 31 August 2006 (tr. 1/125). Even though the Solicitation did not include any of Mr. Gee's pre-Solicitation handwritten information, and despite the Solicitation's express cautions against considering any information outside the four corners of the Solicitation (finding 7), Mr. McDonnell testified that he based his bid on Mr. Gee's handwritten information. His bid also incorporated a bid for the whole job from subcontractor NVBS that did not provide any design details or drawings. (Tr. 1/113-14, 127-28, 130-32; finding 8) Mr. McDonnell acknowledged that the SOW made no representation as to whether the new endwalls were or were not to be attached to the existing structure; however, he interpreted the Solicitation drawings to show dark vertical lines depicting new supports for the endwalls to be connected to the bottom of the existing roof trusses of the structures (R4, tab 1 at 62-63; tr. 1/50-52, 79). Mr. McDonnell testified that the information from which he got his understanding that the endwalls were to be connected and not free-standing was from the figures hand drawn by Mr. Gee:

[T]he size of the footings with the stem wall would indicate you would have to use the existing building to support the end walls.

(Tr. 1/132) Mr. McDonnell did not give any details to indicate by what calculations or other investigation he arrived at his interpretation, nor has RLMC offered any evidence of its intended design at the time of bid. Mr. McDonnell apparently based his bid on his assumption and that of his subcontractor NVBS that they would install pre-engineered endwalls, even though they had no manufacturer information (findings 8, 20, 21). Under questioning, Mr. McDonnell maintained that he interpreted Mr. Gee's handwritten

information to state that 18 cubic yards (CY) of concrete would be the total of all the concrete necessary for footings for all four endwalls (tr. 1/70-71, 107-10, 133). Even though this information was not in the Solicitation, and even though the Solicitation made no representation of any amount for concrete footings, instead requiring the successful bidder to design the footings, Mr. McDonnell claims he based his bid on a total of 18 CY of concrete for footings. On 31 August 2006 RLMC submitted its bid allegedly based on its interpretation that the new endwalls would be attached to the existing structure. (R4, tab 4; tr. 1/47-49, 52, 58) The SOW in the Solicitation required that all bidders were to include a “[c]omplete construction time line based upon receipt of a notice to proceed” and one sketch with their bids (R4, tab 1 at 53, §§ 1.6.1.1-1.6.1.3). There is no evidence in the record that RLMC did so. Bid opening was on 31 August 2006 and RLMC’s bid for the construction of endwalls on both buildings (exclusive of the option for provision of roll-up doors) was \$128,000, exactly \$40,000 less than the one other bidder (supp. R4, tab 29; app. supp. R4, tab 18).

13. Contract No. W912GY-06-C-0003 was awarded to RLMC on 18 September 2006 for the firm fixed-price of \$128,000.00 with the option to install two motorized roll-up doors (R4, tab 5). The performance period was 90 days (R4, tab 5 at 1). The contract identified Larry Duncan as the Contracting Officer’s Representative (COR) (R4, tab 5 at 45, § 1.9). The contract incorporated the following clauses by reference:

a. FAR 52.233-1, DISPUTES (JUL 2002), which provides in pertinent part:

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

b. FAR 52.236-2, DIFFERING SITE CONDITIONS (APR 1984)

c. FAR 52.236-3, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984), which provides:

(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, river

stages, tides, or similar physical conditions at the site; (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

(b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

(R4, tab 1 at 7, 18)

14. A preconstruction meeting was held on 18 October 2006 at which the Army issued a notice to proceed making the contract completion date 16 January 2007 (R4, tab 6). RLMC admits it was at this meeting that it first requested the name of the manufacturer of the two existing Butler-Style Buildings 214 and 215 (R4, tab 26 at 2; tr. 1/61, 63, 110-11, 149, 153-54). Mr. McDonnell testified that he made the request so RLMC could use the particular manufacturer's standard pre-engineered endwalls:

Q Couldn't you have just added the end wall additions to the existing structures without information relating to the existing building?

A No, because then it would probably be safety issues that would have to be forfeited.

Q What types of safety issues?

A Well, like the wind loads, the bearing – load-bearing, and that's it.

(Tr. 1/61-62; *see also* tr. 1/80) Mr. McDonnell testified that COR Duncan said he would get the manufacturer name for RLMC (tr. 1/63). The CO testified that, after RLMC's request, a search was conducted, but no manufacturer information was found (tr. 2/101-02). There is no evidence in the record before us that the government was in possession of manufacturer information for Buildings 214 and 215.

15. The SOW required RLMC to have all materials approved by the COR prior to installation (R4, tab 5 at 44, § 1.4). More than three months after contract award, in a letter dated 2 January 2007,² RLMC requested an extension of the contract performance period:

We...hereby request extending contract completion to March 16, 2007. We have just now received the revised design shop drawings from our subcontractor and will be express mailing to your office. As you probably already know, we have encountered delay's [sic] on the design of the new end walls, this was greatly due to not having original "As Built" drawings or the manufactu[r]er name available to us. Not having this building information, required additional time to re-calculate and engineer an acceptable design for this project.

If you can possibly expedite review and approval of submitted drawings by next week, we can have all material delivered to site in 2-3 weeks, thus allowing sufficient time for installation of endwalls by March 16, 2007[.]

Please let me know if there is [sic] any questions or concerns in regards to above.

(R4, tab 7) This is the first mention in the record of the existence of a design by RLMC for the endwalls. By email dated 22 January 2007 RLMC was granted an extension to 16 February 2007. The letter also offered to consider a further extension to 16 March 2007 in exchange for consideration from RLMC. (R4, tab 8) On 24 January 2007

² The date on the letter says 2006, but the context makes clear that it was intended to be 2007.

COR Duncan approved the materials submitted by RLMC for use on the project (R4, tab 9).

16. Mr. McDonnell testified that site work, primarily excavation, began in January 2007 but was halted when the government changed the design (tr. 1/66-67). In February 2007 the government notified RLMC that the government had "identified a new requirement" such that the dimensions for the optional south wall roll-up door openings in both Butler-Style buildings were changed in order to provide Mission Operations, the user of the buildings, "free through flow of traffic in and out of Buildings 214 and 215" (R4, tabs 10-11; supp. R4, tab 33; app. supp. R4, tab 10). The government contends that the contract was modified on 5 February 2007 (gov't br. at 9), however RLMC takes the position that the contract was never formally modified to reflect this changed work (app. br. at 9; tr. 1/68-69) and we have found no evidence of a contract modification in the record before us. RLMC's drawings incorporating the changes were approved on 19 March 2007 and RLMC was approved on 20 March 2007 to proceed with the work (R4, tabs 12-15; app. supp. R4, tabs 10-11; tr. 1/67-69). RLMC began work again on Monday, 26 March 2007 (R4, tab 16; tr. 1/67). We find no identifiable segment of RLMC's claim now before us for this changed work.

17. On 8 April 2007 RLMC submitted a cost proposal due to alleged extra work as a result of installation of heavier footings resulting in increased concrete, reinforcing and structural steel and labor costs than were included in its bid (R4, tabs 17-19; tr. 1/64-66, 76, 79, 80-88, 142-45, 150-52, 155-59). This was the first notification to the government that RLMC believed it was incurring additional costs for work it considered to be beyond the contract (tr. 1/188-89). On 3 May 2007 the CO advised RLMC by letter that its cost proposals did not meet the requirements of a claim and that more information was needed (R4, tab 19; tr. 1/88-91, 171-75, 204).

18. In April and May 2007 RLMC completed all excavation and removal of existing concrete and placed 95.75 CY of concrete footings for the new endwalls (R4, tab 21; supp. R4, tabs 35, 36; app. supp. R4, tabs 3, 13; tr. 1/70-71, 107-10). In mid-May 2007 RLMC's subcontractor, NVBS, began vertical structural steel construction, which was "[e]ssentially" complete by 1 June 2007, with final completion by 1 July (tr. 1/71-80; supp. R4, tabs 36, 37; app. supp. R4, tab 14).

19. By letter dated 1 June 2007 RLMC submitted a five-page claim package to the CO seeking a total of \$48,447.00 in costs incurred for alleged extra work:

We were unable to get from the government the name and manufacturer of the existing building so we could use their pre-engineered design for the end walls. Therefore, the end walls had to be designed to withstand wind loads entirely independent from the existing structure. Pre-bid information and best guess estimates fell far short of actual cost to complete this unforeseen site condition.

(R4, tabs 19, 20; tr. 1/12-13, 91-96, 175-78)

20. On 10 July 2007 RLMC stated in an email to the CO:

Bid was based on End Walls for "Butler Style" building using pre-engineered design and attaching to existing structure as shown on sketch dated 14 March 2006 of the solicitation.

(R4, tab 23 at 4-5) The CO responded that she needed more information as to what RLMC alleged caused it to incur additional costs (tr. 1/179). On 11 July 2007 RLMC sent another email to the CO in which it stated:

Original bid for End Walls was based on conventional light post and small footings....

Not having the drawings from the existing structure caused additional cost....

(R4, tab 23 at 1-2) RLMC attached a letter from Crandall Engineering:

In the design of open sided metal buildings such as those at the Sierra Army Depot, many building manufacturers design the structures assuming the walls may be added at some time in the future. While this may add slightly to the initial cost of the structure and require larger footings at some locations, it allows for walls to be added using standard construction without modification of the existing building.

While this practice is common, it is not universal. Unless available information clearly shows a structure is designed to support enclosing walls, safety and stability considerations required that an engineer assume buildings are not designed to support enclosing walls when such walls are added.

If the buildings had been designed to be enclosed, the endwalls could have been constructed with relatively light posts supported both at the roof and foundation. The foundation would have consisted of relatively small pier footings or a grade beam on the order of 16" wide by 24" deep running the full width of the building.

Since no engineering was available, the new endwalls had to be designed as completely separate and freestanding structures. The posts had to be designed as cantilever columns with no top support. This resulted in the posts being much heavier and the footings much larger than normal. In the case of the footings, the actual concrete required was about three times as much as would have been required for a conventional endwall. [Emphasis added]

(R4, tab 23 at 9; app. supp. R4, tab 15) The CO did not find RLMC's submissions to be helpful (R4, tab 23 at 1; tr. 179-82).

21. On 16 July 2007 RLMC provided a package to the CO by fax that included its letter plus attachments A (Mr. Gee's February 2006 sketch), B (Mr. Gee's February 2006 cost estimates), C (bid opening results), and D (the Crandall Engineering letter quoted in finding 20). RLMC's letter recounted his February 2006 pre-solicitation discussion with Mr. Gee (finding 3), and further stated:

After reviewing the Statement of Work with reference to "End Walls for Butler Style building", it was safe to assume they would be of standard construction. After award of [the] contract, we tried, but to no avail, [to] get the manufacture[r] of the existing building from the government so we could use that design for the end walls. Not able to get [the] name of [the] manufacture[r], a free standing design requiring huge footings that were not anticipated, nor was it made clear in the Statement of Work. The price quoted for work was in line with the government estimate. (Exh. C) Reference letter from Crandall Engineering (Exh. D) defines how extra cost could occur with or without available engineering. I bel[ie]ve that the intent of this solicitation was to use a conventional end wall as that was the direction being taken during the first 3 month[s].

(R4, tabs 24, 26) We note that there is nothing in the record to corroborate the last sentence quoted above. On the same date RLMC also faxed an additional letter to the CO from subcontractor NVBS which stated:

We were asked to provide endwalls for a standard pre-engineered building which was designed to meet the snow load, wind load and seismic conditions for the Herlong area of California. It was assumed that with the acceptance of our quote we would be provided with copies of drawings and engineering of the two existing structures. However, the drawings that were provided were for the existing foundation only and did not provide the required structural engineering or drawings that were needed for standard endwall and foundation design. When we requested more information regarding the existing structures we were informed that it was not available nor did anyone have the name of the manufacturer of the buildings.

Building designs vary between manufacturers and a pre-engineered structure which is a roof only may not be designed to accept the additional wind load of endwalls even though the building meets the required design load of the area (*see attached letter by Crandall Engineering*). Had the proper engineering been provided most likely the foundation design would have required substantially less concrete but since it was not, it was necessary to provide a design that would have minimum impact to the existing structures.
[Emphasis in original]

(R4, tabs 23 at 6-8, 26) COR Duncan opined to the CO:

I have several problems with [the] letter.... First; When the initial Bid Package was sent out we provided ample pictures of the existing breezeways with nomenclature orienting the photos, i.e.: Building 214 looking North, etc. These photos gave a pretty clear idea of the existing conditions that would warrant further inquisition if needed such as: Material thickness, flange/web width and so on. The second problem is a Site Visit was held that offered Mr. McDonnell and his key players an opportunity to view the existing structure first hand. Third and finally; the parties in question submitted their bid and acceptance occurred before they asked for any "as built" drawings of existing structure, so the price was in

place and they should not submit the price before a design is done, albeit cursory at best. Given these conditions I do not see where that letter really changes anything.

(R4, tab 23 at 6)

22. On 7 November 2007 the CO issued a final decision in which the majority of RLMC's claim was denied:

DESCRIPTION OF THE CLAIM: RLMC claims that the initial estimate(s) to complete the project fell far short of the actual cost to complete the subject contract. Specifically, RLMC claims that [the Army] did not provide the name of the manufacturer of the existing building so that RLMC could use their pre-engineered design for the end walls. As a result, RLMC claims that it incurred additional costs because the end walls had to be designed to withstand wind loads entirely independent from the existing structure.

....

STATEMENT OF THE FACTUAL AREAS OF AGREEMENT AND DISAGREEMENT: Both parties agree that larger concrete footings were in fact poured. Both parties can also agree that the end walls were to be for a "Butler" style building. However, the government disagrees that the larger concrete footings were due to RLMC's claim that they did not have pre-engineered drawings.

CONTRACTING OFFICER'S DECISION WITH SUPPORTING RATIONALE: RLMC's request of \$48,447.00 is being denied. However, the Contracting Officer authorizes payment to RLMC in the amount of \$1,265.00 for work that was specifically asked for by the government...[and] is based on \$1,000.00 for NST Engineering soil test plus 10% overhead and 15% profit....

(R4, tab 27; tr. 1/205-11) The final decision also stated that, under FAR 52.236-3 (finding 13c), the government is not responsible for assumptions, interpretations or conclusions made by RLMC.

23. RLMC's timely 5 December 2007 notice of appeal was docketed as ASBCA No. 56262.

DECISION

RLMC asks us to find it entitled to \$48,447.00 in compensation for additional costs it claims to have incurred in designing and placing the concrete footings/foundations for the endwalls installed under the contract. RLMC's claim submitted to the CO sought compensation on the sole basis of differing site conditions (finding 19). In its complaint, RLMC added the additional theory of constructive change (compl. ¶¶ 12-15). At the hearing, RLMC requested leave to amend its complaint to include additional theories of recovery (tr. 1/13-14). In its post-hearing brief RLMC alleges (1) differing site conditions, (2) defective drawings, (3) ambiguity in the SOW and (4) government failure to cooperate constituting a breach of the duty of good faith and fair dealing (app. br. at 3-4; tr. 1/13-14, 2/66-67).

The test for what constitutes a "new" claim is whether the "claims are based on a common or related set of operative facts. If the [Board] will have to review the same or related evidence to make its decision, then only one claim exists." A new legal theory or argument, when based upon the same operative facts, does not constitute a new claim. [Citation omitted]

Nova Group, Inc., ASBCA No. 55408, 10-2 BCA ¶ 34,533 at 170,323. As all the theories of recovery alleged by RLMC in its post-hearing brief require us to review the same or related evidence, we hold that they are properly before us for decision.

A. Ambiguity in the SOW

RLMC claims that the SOW contained in the Solicitation was ambiguous and "susceptible to more than one reasonable interpretation" because it did "not absolutely indicate whether the [endwalls were] to be attached to the existing structures and rely upon those structures for support, or if the [endwalls were] to be designed and built as freestanding." RLMC further argues that this alleged ambiguity was latent, i.e. not "so glaring as to raise a duty to inquire." On this basis, RLMC asks us to construe the alleged ambiguity against the government as the drafter of the SOW. (App. br. at 20-21)

The government argues that the SOW was not ambiguous but that it contained performance requirements in conformance with which the engineering, design and installation of the endwalls was the sole responsibility of the successful bidder. The government argues in the alternative that, if it is our determination that the SOW was

ambiguous, such an ambiguity was obvious and patent, requiring that RLMC seek clarification before submitting its bid. (Gov't br. at 19)

The determination of whether a contract ambiguity exists is a question of law. *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1579 (Fed. Cir. 1993). When the Board “steps into the shoes of a reasonable and prudent businessperson aware of the situation” and a “plain reading of the contract as a whole seems to yield only one reasonable interpretation,” there is no ambiguity. *Randallstown Plaza Associates v. United States*, 13 Cl. Ct. 703, 706 (1987); *Roxco, LTD*, ENG BCA No. 6435, 00-1 BCA ¶ 30,687 at 151,581; *Harco Manufacturing Co.*, ASBCA No. 27567, 85-1 BCA ¶ 17,926 at 89,759, *aff'd*, 790 F.2d 91 (Fed. Cir. 1986) (table). The rules of contract interpretation are well established that a contract is read in accordance with the plain meaning of its express terms.

A contract's meaning must be gleaned from the four corners of the document and any interpretation which renders any of the terms meaningless, inexplicable, without purpose or useless is perforce unreasonable. *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972 (Ct. Cl. 1965); *Reflectone, Inc.*, ASBCA No. 34891, 89-3 BCA ¶ 21,962.

Western States Management Services, Inc., ASBCA No. 37504 *et al.*, 92-1 BCA ¶ 24,663 at 123,036; *Triax Pacific, Inc. v. West*, 130 F.3d 1469 (Fed. Cir. 1997). Where a contract is not ambiguous, the wording of the contract controls its meaning and resort cannot be had to extraneous circumstances or subjective interpretations. *Perry & Wallis, Inc. v. United States*, 427 F.2d 722, 725 (Ct.Cl. 1970).

Within the four corners of the contract, the government provided performance specifications in conformance with which a successful bidder was responsible to engineer, design and install the endwalls and associated foundations and structural steel for existing Buildings 214 and 215 (finding 9). The SOW makes no representation as to whether the bidder's design was to rely upon the existing buildings for support or not—that decision was left entirely to the bidder so long as the resulting structure met the performance requirements (wind, snow and soil loads, seismic activity, etc.). Even if the endwalls were attached to the existing structure, there is no indication in the SOW that mere attachment, which could be as simple as flashing to keep out the elements (finding 5), would provide structural support sufficient to meet the contract's performance requirements. The fact that the SOW did not specify the design but made the choice of design one to be made by the prospective bidders did not render the SOW ambiguous. We conclude that RLMC's interpretation of the SOW that it could rely upon the endwalls for structural support was not reasonable.

B. Defective Drawings

RLMC alleges that the drawings included in the Solicitation were defective, thereby providing an alternative theory under which it is entitled to the recovery it seeks (app. br. at 19-20). In particular, RLMC alleges that:

The drawings illustrating the work...depict the vertical supports for the endwall addition as bold vertical lines. Those drawings each depict the new vertical supports for the endwall additions to be attached to the existing structure at the roof truss. Based upon the drawings, McDonnell reasonably expected that the endwall additions would be attached to, and rely upon, the existing structures for support, and [RLMC] submitted a bid in an amount reflecting that reasonable expectation.

However, with the minimal building information [provided in the Solicitation and no additional information provided after contract award] the endwalls could not safely rely upon the existing structures for support because strong wind could potentially cause the buildings to collapse if the existing structures were not originally designed to support endwall additions.

[T]he drawings [the government] provided with the Solicitation indicated that the endwall additions to the Butler-Style buildings could be easily, and relatively inexpensively, installed and rely on the existing structures for support. [Citations omitted]

(*Id.* at 19) RLMC takes the position that it installed larger concrete footings for the endwalls than it planned in its bid as a result of the allegedly defective drawings.

The government responds that the Solicitation drawings were not defective and that the specification and specific drawing features claimed to be defective by RLMC were performance specifications in conformance with which RLMC was to create its own design specifications for the construction of the endwalls (gov't br. at 14-19).

We have already found that the Solicitation specifications and drawings set forth performance requirements to which the successful bidder was required to design and build the endwalls (finding 9). Under the resulting contract, RLMC (or its subcontractor NVBS) was responsible to create its own design in accordance with which the project

was to be constructed, making sure its design met the various performance requirements set forth in the Solicitation.

The record is replete with evidence that RLMC and its subcontractor NVBS based their respective bids on their assumption that they would install endwalls pre-engineered by the manufacturer of Buildings 214 and 215 (findings 8, 12, 19-21). They did so even though: (a) the Solicitation provided no information about the manufacturer, nor indicated that any such information was available; (b) neither of them inquired of the government nor, apparently, performed any independent research or investigation to ascertain the manufacturer information prior to bid; (c) NVBS was fully aware that manufacturers' designs are not universal; and, (d) NVBS also knew that, in the absence of manufacturer design information, the assumption must be made that the existing building cannot be relied upon to provide support for later-added endwalls. Based on the record before us, even if the government had possessed and provided manufacturer information when RLMC requested it after award, an occurrence that both RLMC and NVBS say they based their bids on, manufacturers were different and pre-engineered endwall designs were not universal (findings 8, 20-21). There could therefore be no guarantee that the particular manufacturer of Buildings 214 and 215 had pre-engineered endwalls at all, nor that they would or would not be able to be attached to the existing buildings for support, nor that they could be installed for the price that RLMC had bid. To the extent RLMC indicated in its bid that it would meet the Solicitation's performance requirements and did so while holding a belief that it had inadequate information, it did so at its own risk. On the basis of the foregoing, we find no basis for granting recovery on the theory of defective drawings.

C. Differing Site Conditions

It is RLMC's position that it encountered both Type I and Type II differing site conditions which entitle it to the reimbursement of the extra costs it seeks (app. br. at 15-19). RLMC bases its allegation of differing site conditions upon its interpretation of the drawings as requiring the vertical supports for the new endwalls to be attached to the existing buildings at the roof truss and that the endwalls would rely upon the existing structures for support (app. br. at 16).

A differing site condition is a condition existing at the jobsite at the time of contract award which differs from the representation of the same condition shown in the contract drawings and specifications. RLMC has not offered any proof, nor even made any allegations, that the actual conditions at the site (*i.e.* the existing Buildings 214 and 215) differed from the representations of the existing buildings in the contract. Rather, RLMC's allegations focus on the new endwalls to be designed and the means of their installation, neither of which were conditions existing at the jobsite at the time of contract award. As a result, there is no basis for any recovery due to differing site conditions.

D. Government Failure to Cooperate

RLMC alleges that the government breached its duty of good faith and fair dealing by not providing manufacturer information when RLMC requested it 30 days after contract award at the Preconstruction Meeting and again when the government “allowed [RLMC] to run up substantial additional construction costs in completing the Subject Project while implying to [RLMC] that it would be paid for the work when [the government] knew full well that they would never compensate [RLMC] for the extra work” (app. br. at 21-23).

The covenant of good faith and fair dealing is an implied duty that each party to a contract owes to its contracting partner. The covenant imposes obligations on both contracting parties that include the duty not to interfere with the other party’s performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract. The duty applies to the government just as it does to private parties.

RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981); *Centex [Corp. v. United States]*, 395 F.3d [1283] at 1304.

AECOM Government Services, Inc., ASBCA No. 56861, 10-2 BCA ¶ 34,577 at 170,468.

When the government is accused of failing to cooperate, we examine the reasonableness of its actions, considering all of the circumstances. *Free & Ben, Inc.*, ASBCA No. 56129, 09-1 BCA ¶ 34,127 at 168,742. However, clear and convincing evidence is needed to overcome the presumption that government officials act in good faith. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1236, 1239 (Fed. Cir. 2002). Indeed, the court of appeals has noted that “not all misbehavior” breaches the implied duty of good faith and fair dealing and [has] discussed governmental breach of the duty in terms of “bait and switch” actions or those specifically targeted at a party’s contract rights. *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 829 (Fed. Cir. 2010).

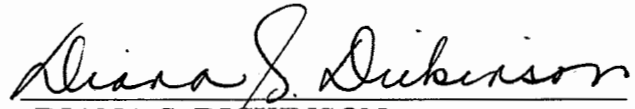
Versar, Inc., ASBCA No. 56857 *et al.*, 12-1 BCA ¶ 35,025 at 172,126; *see also Teresa A. McVicker, P.C.*, ASBCA Nos. 57487, 57653, slip op. dtd. 16 August 2012 (example of bait and switch tactics by the government results in finding of material breach).

We have found that, upon RLMC's request after contract award for manufacturer information pertaining to Buildings 214 and 215, the government conducted a search and found no manufacturer information. We have further found that there is no evidence in the record before us that the government ever possessed such manufacturer information. We have also found that RLMC's expectation that it would receive manufacturer information after award and its reliance on that expectation in its bid was unreasonable. Likewise, we find unreasonable RLMC's argument that the government breached its duty of good faith and fair dealing when the government continued to ask RLMC for support for its claims and did not specifically say, prior to issuance of a contracting officer's final decision, whether or not RLMC would receive any compensation. In the absence of a showing of a reasonable expectation, RLMC has failed to meet its burden of proving a government breach of its duty of good faith and fair dealing.


CONCLUSION

On the basis of the foregoing, the appeal docketed as ASBCA No. 56262 is denied in its entirety.

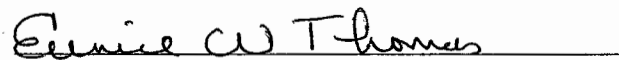
Dated: 22 October 2012


DIANA S. DICKINSON
Administrative Judge
Armed Services Board
of Contract Appeals

I concur


MARK N. STEMLER
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. 56262, Appeal of R.L. McDonnell Construction, rendered in conformance with the Board's Charter.

Dated:

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