

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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Caddell Construction Co., Inc. ) ASBCA No. 57831  
 )  
Under Contract No. FA3002-07-D-0006 )

APPEARANCE FOR THE APPELLANT: Timothy W. Burrow, Esq.  
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Nashville, TN

APPEARANCES FOR THE GOVERNMENT: Elliot J. Clark, Jr., Esq.  
Deputy General Counsel  
James F. Hayes, Esq.  
Assistant General Counsel  
Defense Commissary Agency  
Fort Lee, VA

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

Caddell Construction Co., Inc. (Caddell) appeals the denial of its monetary claim for a mistake in bid allegedly induced by the contracting agency's failure to designate clearly the applicable Davis-Bacon Act wage determination rate for structural ironworkers on a building construction task order. The government moves to dismiss for lack of jurisdiction. Appellant opposes. We find jurisdiction and deny the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 14 July 2009, the government issued a request for proposals (RFP) for construction of a new commissary building and related site work at Ft. Campbell, Kentucky (R4, tab 5). On 3 September 2009, the solicited project was awarded to Caddell as a task order under the captioned contract (Contract 0006) (R4, tab 9 at 1-3). The terms and conditions specified in the contract and applicable to the task order included, among others, the FAR 52.222-6, DAVIS-BACON ACT (JUL 2005) clause, the FAR 52.222-14, DISPUTES CONCERNING LABOR STANDARDS (FEB 1988) clause, and the FAR 52.233-1, DISPUTES (JUL 2002)-ALTERNATE I (DEC 1991) clause (R4, tab D(18) at 9-11).
2. The Davis-Bacon Act clause required, among other things, that workers on the task order be paid wages and fringe benefits "computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof...." FAR 52.222-6(b)(1). The contracting officer is responsible

for the selection of the wage determination(s) to be included in a construction procurement. General requirements for such selection are set forth in FAR 22.404-2 in relevant part as follows:

**22.404-2 General requirements.**

(a) The contracting officer must incorporate only the appropriate wage determinations in solicitations and contracts and must designate the work to which each determination or part thereof applies....

(b) If the wage determination is a general wage determination or a project wage determination containing more than one rate schedule, the contracting officer shall either include only the rate schedules that apply to the particular types of construction (building, heavy, highway, etc.) or include the entire wage determination and clearly indicate the parts of the work to which each rate schedule shall be applied. Inclusion by reference is not permitted.

3. The commissary construction task order included three general wage determinations for Montgomery County, Tennessee, where the commissary building was to be constructed (R4, tab 9 at 30, 33, 37).<sup>1</sup> The wage determinations pertinent to this appeal were: (i) General Decision Number TN080011, dated 22 May 2009, for "BUILDING CONSTRUCTION PROJECTS" (hereinafter "the Building Construction Wage Determination"),<sup>2</sup> and (ii) General Decision Number TN080010, dated 8 February 2008, for "HIGHWAY CONSTRUCTION PROJECTS" (hereinafter "the Highway Construction Wage Determination").<sup>3</sup> The Building Construction Wage Determination

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<sup>1</sup> Ft. Campbell straddles the state line between Kentucky and Tennessee. The new commissary building was on the Tennessee side of the installation.

<sup>2</sup> Building construction is generally the construction of sheltered enclosures with walk-in access for housing persons, machinery, equipment, or supplies. It typically includes all construction of such structures, installation of utilities and equipment (both above and below grade level), as well as incidental grading, utilities and paving, unless there is an established area practice to the contrary. FAR 22.404-2(c)(1).

<sup>3</sup> Highway construction is generally the construction, alteration, or repair of roads, streets, highways, runways, taxiways, alleys, parking areas, and other similar projects that are not incidental to "building," "residential," or "heavy" construction. FAR 22.404-2(c)(3).

total hourly rate for “Ironworkers, Structural” was \$32.10 (*id.* at 30). The Highway Construction Wage Determination total hourly rate for “Ironworkers”, “Structural” was \$12.32 (*id.* at 37).

4. On or about 30 September 2010, Caddell became aware that a second tier subcontractor (Trinity Contracting) was paying its structural ironworkers less than the Building Construction Wage Determination rate. In a letter of that date to Circle C Construction (the responsible first tier subcontractor), Caddell told Circle C to resolve the issue and that pending resolution Caddell would withhold from payments otherwise due Circle C the amount Caddell estimated (\$8,200) was due the Trinity structural ironworkers (R4, tab 10).

5. By letter to Circle C dated 9 October 2010, Trinity defended its payments to its structural ironworkers as follows:

In review of the issue of the prevailing wage rates at the Ft. Campbell “New Commissary Project” we still have one major question. That question is that we have not seen any documentation from Caddell through Circle C stating...where in the Contract Documents a contractor is to know which prevailing wage rate to be used for different activities and locations. The only reference made in the contract documents as we know it and have relayed to Circle C and Caddell, was a [sic] Amendment 02 dated 8-12-09 from the contracting officer, Alice J. Allen, in which it was stated that for the cement finishers to use the [Highway Construction Wage Determination] to place the concrete on the entire Tennessee side of the site, which includes the building foundations, floor slabs, elevated floors slabs, grouting under the columns that Trinity set, etc.... This is the prevailing wage scale that we calculated our bid with....

(R4, tab C(17))

6. The RFP Amendment 02 referred to in Trinity’s letter of 9 October 2010 included a section of questions and answers from a pre-proposal conference on 28 July 2009. One of the questions and answers was the following:

3. None of the wage decisions have cement finishers listed as a category. Please advise.

**GOVERNMENT RESPONSE: ...DOL Decision Nr. TN080010 Page 1 for 23, Montgomery County, lists Concrete Finisher.**

(R4, tab 7 at 10) The cited "DOL Decision" in the government response was the Highway Construction Wage Determination.

7. Circle C sent the 9 October 2010 Trinity letter to Caddell, and Caddell on 14 October 2010 sent it to the contracting officer with the following statement:

Caddell is maintaining the position that there was a published building wage rate for steel erection at the time of the bid. No previous questions or requests for clarification have been submitted. There has not been a request for a wage rate determination from the Department of Labor on this issue. Caddell answered the question as too [sic] the applicable rate on May 05, 2010 and instructed that the Tennessee Building wage rate be applied.

Please notify me promptly if the Tennessee Highway scale is indeed the rate that should have been used and should be in effect currently.

(R4, tab 11)

8. On 15 October 2010, the contracting officer replied to Caddell's inquiry in relevant part as follows:

I reviewed the attached letter from Trinity and find no basis for their position to use the "Highway Wage Decision" for the Ironworker (Structural), when a Wage Decision for Building, TN080011, 5/22/2009 is attachment [sic] and incorporated into the resultant Task Order.

....

Trinity should be paying the correct and proper rate to the employees on their payrolls[.]

(R4, tab 11)

9. On 18 October 2010, Caddell sent to Circle C a copy of the contracting officer's response with the following direction: "All certified payroll records from

Trinity are to be corrected applying the established wage rate for Tennessee Building Ironworker (Structural). Provide copies of restitution checks for the effected employees.” (R4, tab 12)

10. On 24 November 2010, Circle C submitted a proposed change order to Caddell in the amount of \$113,212.44 for the difference (\$88,794.06) between the amounts originally paid the Trinity structural ironworkers and the prevailing rate in the Building Construction Wage Determination, plus 10% overhead, 15% profit, and 2.50% bond (R4, tab 13). By letter dated 30 November 2010, Caddell rejected the proposed change order on the ground that: “Our subcontract agreement with Circle C is clear and includes General Wage Decision #TN080011 (Building) dated 5/22/2009. There is no justification for the requested change order and Caddell will not issue one.” (R4, tab 14)

11. In a letter to the contracting officer dated 4 January 2011, Circle C requested the government to “agree” that the Highway Construction Wage Determination was the wage determination applicable to the building erection structural ironworkers because:

[At the 28 July 2009 pre-proposal conference] a question was raised as to which wage rates to use for the cement finishers. The only cement work required was in the building. The government’s response was to use TN080010 which is “highway.”

Given that there was no highway on the project, the government’s response was construed to mean that “BLDG,” “HEAVY,” AND “HWY” designations had no meaningful application for this project. Furthermore, neither Circle C in its years of doing government work, nor its ironworker subcontractor had seen a government project require some of its building workers to be paid under one number and other building workers to be paid under another number. Given the history that all building workers are paid the [sic] under the same number, and the government specifically required the cement finisher workers of the building to be paid under [the Highway Construction Projects number], it was reasonable to assume that other building workers would not be paid under a different number.

Therefore, the wage rate for ironworkers under [the Highway Construction Projects number] was used in the bid, and the workers are presently being paid under that number....

(R4, tab 15)

12. At some time between 4 January and 22 July 2011, Circle C submitted to Caddell an updated claim in the amount of \$169,428.26 for the difference between the wages paid and the prevailing wage in the Building Construction Wage Determination for the Trinity structural ironworkers, plus "Labor Burden" for Trinity, and overhead and profit for both Trinity and Circle C (R4, tab 4 at 3).

13. On 22 July 2011, Caddell submitted a certified claim to the government adopting as its own the Trinity/Circle C claim plus its own mark-ups for a total claim of \$201,611.40 (R4, tab 4 at 1-2). By final decision dated 10 August 2011, the contracting officer denied the Caddell claim entirely (R4, tab 3). This appeal followed.

14. The government moves to dismiss the appeal for lack of jurisdiction citing the Disputes Concerning Labor Standards clause of the contract and FAR 22.404-11 (gov't mot. at 2). The Disputes Concerning Labor Standards clause states that disputes concerning labor standards requirements shall be resolved under the DOL disputes procedures and "not the Disputes clause of this contract." FAR 22.404-11 states that the DOL Administrative Review Board "decides appeals of final decisions made by the Department of Labor concerning Davis-Bacon Act wage determinations."

15. Appellant opposes the motion on the grounds that (i) there is no dispute over the applicable wage determination since the Trinity structural workers have now been paid in accordance with the Building Construction Wage Determination, and (ii) its claim is for "confusion" by the contracting agency in the solicitation of the task order that caused Trinity to base its bid on the wrong wage determination (app. resp. at 2-5).

### DECISION

We do not decide on this motion the merits of appellant's claim of "confusion" created by the government in the solicitation of the task order, but we agree that the claim is within our Disputes clause jurisdiction. In previous decisions, we have found Disputes clause jurisdiction on claims for funds withheld for labor-standards violations where "alleged Government actions and omissions caused appellant to erroneously base its bid on labor calculations premised on [the violation]," see *Woodington Corp.*, ASBCA No. 34053, 87-3 BCA ¶ 19,957 at 101,032, and where "the complaints focus on the contracting officer's role in soliciting bids and awarding the contracts." See *Emerald Maintenance, Inc.*, ASBCA Nos. 36628, 36632, 88-3 BCA ¶ 21,103 at 106,532, *aff'd*, 925 F.2d 1425 (Fed. Cir. 1991). We have also found Disputes clause jurisdiction on a claim for reimbursement of additional wages paid where there was an alleged "mistake (mutual or unilateral) as to the applicability of the Davis-Bacon Act to appellant's employees." See *Central Paving, Inc.*, ASBCA No. 38658, 90-1 BCA ¶ 22,305 at 112,018.

Caddell's claim for reimbursement for government "confusion" in soliciting the task order is substantially a claim for reimbursement for a mistake in bid allegedly induced by the government. While the factual predicate of the claim is the Building Construction Wage Determination, Caddell does not dispute the applicability of that determination to the Trinity structural ironworkers. As a claim for mistake in bid, induced by the government, Caddell's claim is within the class of the claims cited above. It is a matter of contract formation, the contractual rights and obligations of the parties with respect to a mistake in bid and is accordingly within our Disputes clause jurisdiction.

The motion to dismiss is denied.

Dated: 21 May 2012



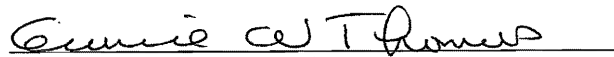
MONROE E. FREEMAN, JR.  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur

I concur



MARK N. STEPLER  
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. 57831, Appeal of Caddell Construction Co., Inc., rendered in conformance with the Board's Charter.

Dated:

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